Jurisdictional Statement

81-743

Office - Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS,
CLERK

NO: A-58

in the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM DANIEL COWGILL, WILLIAM EUGENE COX, TERRY VON SMITH, VINCENT DOYLE, DANNY ROBINSON, JERRY STUBBLEFIELD, RONALD FARACE,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal From The Supreme Court of Florida

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the Florida Statute 893.135 violates the Constitution of the United States:

(1) Whether the statute violates the Fifth and Fourteenth Amendments right to silence where it penalizes the convicted defendant by precluding the court from suspending or reducing the contingent sentence, if he refuses to divulge potentially self-incriminating information to the prosecution; and where the statute coerces the convicted defendant to divulge potentially self-incriminating information to the prosecution without grant of immunity.

(2) Whether the statute violates the Due Process Clause of the Fourteenth Amendment, and the right to assistance of counsel and a public trial guaranteed by the Sixth and Fourteenth Amendments and the right to access to the courts to seek redress of grievances guaranteed by the First and Fourteenth Amendments where the language of the statute requiring "substantial assistance" is vague and where the statute does not provide that a hearing must be conducted to determine the final sentence, where if a hearing as conducted to determine the final sentence, the statute does not provide that the convicted defendant nor his counsel may be present, and the statute provides that the hearing may be conducted in camera.

(3) Whether the statute violates the Eight and Fourteenth Amendments prohibition of cruel and unusual punishment where (a) the statute precludes the consideration of the characteristics of the individual defendant and causes the least culpable defendant to

be sentenced to a more severe term (b) where the statute precludes the exercise of discretion in the determination of the final sentence and (c) where the statute precludes the exercise of discretion during the term of the sentence.

(4) Whether the statute violates the Equal Protection Clause of the Fourteenth Amendment where the statute permits the more experienced and informed and thus more culpable defendants to be eligible to receive a suspended or non mandatory minimum term sentence, but requires that the least culpable defendant, who is a first offender without associates or information valuable to the prosecution, receive a mandatory minimum term.

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WILLIAM DANIEL COWGILL, WILLIAM EUGENE COX, TERRY VON SMITH, VINCENT DOYLE, DANNY ROBINSON, JERRY STUBBLEFIELD, RONALD FARACE,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal From The Supreme Court of Florida

JURISDICTIONAL STATEMENT

WILLIAM DANIEL COWGILL, et al, the Appellants, appeal from the final judgment of the Supreme Court of Florida, dated April 30, 1981, holding that Florida Statute 893.135 is constitutional as not being violative of the First, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Florida which appears in the Appendix hereto; p. 1 *infra*, is not reported as of this date. This opinion does not contain a discussion of the issues. A full discussion appears in the companion case, *State v. Benitez*, 395 So.2d 514 (Fla. 1981). The latter case, dated February 12, 1981 appears in the Appendix hereto, p. 2 *infra*. The lower court, the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, did not publish an opinion. The Order of that Court granting the Motion to Dismiss the Information appears in the Appendix hereto, p. 3 *infra*.

JURISDICTION

The judgment of the Supreme Court of Florida holding that the statute is constitutional was entered on April 30, 1981 Appendix hereto, p. 1 *infra*. Notice of Appeal was filed in the Supreme Court of Florida on July 20, 1981, within ninety days from the date judgment was entered Appendix hereto, p. 4, *infra*. Justice Powell, on July 20, 1981 entered an Order extending the time within which to docket this appeal to September 27, 1981 Appendix hereto, p. 5 *infra*.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

THE STATUTE INVOLVED

The statute involved is Florida Statute 893.135 which appears in Florida Statutes, 1979, Volume III, page 1335. The sections of the statute which raise the constitutional concern are 893.135(2)(3). The statute states:

893.135 Trafficking; mandatory sentences; suspension or reduction of sentences. —

(1) Except as authorized in this chapter or in chapter 500:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine or of any mixture containing cocaine, as described in s. 893.03(2)(a), is guilty of a felony of the first

degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

(2) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

Florida Statute 948.01 referred to above provides that defendants convicted of an offense not punishable by death may be placed on probation. The statute appears in the Appendix hereto p. 6 *infra*.

The sections of the statute which cause constitutional concern, 893.135(2)(3) provide that all sentences rendered pursuant to the statute shall be for mandatory minimum terms: that no sentence shall be suspended or deferred or withheld and that parole shall not be considered. Further if a convicted defendant provides substantial assistance to the prosecutor, the prosecutor may move the court to suspend the contingent sentence or reduce it, and that if the prosecutor so moves, the court may suspend the contingent sentence or reduce it. The statute does not grant immunity nor require a hearing when the court determines the final sentence, nor provide that if such a hearing be conducted that the convicted defendant may be present and may enjoy the assistance of counsel. The statute provides that the hearing wherein the final sentence is determined may be conducted in camera.

CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT, United States Constitution:

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.

FIFTH AMENDMENT, United States Constitution:

No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

SIXTH AMENDMENT, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . and to have the assistance of counsel for his defense.

EIGHTH AMENDMENT, United States Constitution:

Excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted.

FOURTEEN AMENDMENT, United States Constitution:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person . . . the equal protection of the laws.

HOW THE FEDERAL QUESTION WAS RAISED

The State of Florida appealed to the Supreme Court of Florida asserting that the Florida Statute is constitutional and that the court below erred in granting the motion to dismiss.

Several cases raising the same issue where before the Supreme Court of Florida. The Supreme Court of Florida ordered that briefs be filed in one such case styled *State of Florida v. Benitez, et al.*, and that the cause in all other pending cases be stayed pending determination of the *Benitez* case Appendix hereto, p. 9 *infra*. The Supreme Court of Florida granted Appellant's

petition for permission to file an amicus curiae brief Appendix hereto, p. 10, *infra*.

All of the constitutional questions contained in the section of this document entitled "Questions Presented" were contained in Appellant's brief except the First Amendment issue which was contained in the Benitez brief.

The Supreme Court of Florida reversed the Order granting the motion to dismiss filed by Benitez and held that the Florida Statute is constitutional stating:

a. The statute does not violate the Eighth Amendment because the exercise of discretion in sentencing is not constitutionally mandated in non-capital cases and the punishment provided is not cruel and unusual.

b. The statute does not violate the Due Process Clause of the Fourteenth Amendment because its terms are not impermissibly vague.

c. The statute does not violate the Equal Protection Clause of the Fourteenth Amendment because legislation passes the rational basis test.

d. The statute does not violate the Fifth Amendment right against self-incrimination because the statute does not coerce self-incrimination and the statute does not enhance the punishment of an unsentence defendant for his failure to cooperate with the prosecution.

On April 30, 1981 the Supreme Court of Florida reversed the trial courts' order granting Appellants

motion to dismiss. The opinion, without discussion of the issues, remanded the cause for further proceedings not inconsistent with the decision in *State v. Benitez*, Appendix hereto, p. 2, *infra*.

The federal question is presented to this court by Appellants notice of appeal timely filed on July 20, 1981, and by this Jurisdiction Statement.

STATEMENT OF THE CASE

The State of Florida issued an information charging Appellants with Trafficking in Cannabis in violation of Florida Statute 893.135(1)(a)(2), Florida Statue 893.03(1)(c) and Florida Statute 893.13(1)(a)(2), and criminal Conspiracy to Traffic in Cannabis in violation of Florida Statutes 774.04(3), 779.04(4)(b), 893.03(1)(c), 893.135(1)(a)(2) and 893.13(1)(a)(2) Appendix hereto, p. 7 *infra*. Appellants move to dismiss Appendix hereto p. 9 *infra*. The Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, held that the Florida Statute is unconstitutional and granted the motion to dismiss. Appendix hereto, p. 3 *infra*.

THE QUESTION IS SUBSTANTIAL

The first issue is whether the statute violates the Fifth and Fourteenth Amendments right to silence where it penalizes the convicted defendant, by precluding the court from suspending or reducing the contingent sentence, if he refuses to divulge potentially self-incriminating information to the prosecution; and where the statute coerces the convicted defendant to divulge

potentially self-incriminating information to the prosecution without grant of immunity.

In *Roberts v. United States*, 445 U.S., 552, 100 S.Ct. 1358, 63 L.Ed.2d. 622 (1980) this Court was faced with substantially the same issue. Roberts was sentenced by the trial judge to a higher term because he refused to divulge potentially self-incriminating information that might be used to prosecute others. Roberts asserted in his appellate brief, that his Fifth Amendment right not to incriminate himself was thereby violated. This court held that since the Fifth Amendment issue had not been presented to the trial court, it was not preserved for review. Thus no further consideration of the issue was required. Nonetheless this court discussed the issue at length and indicated that the question was substantial. This court stated:

> These arguments would have merited serious consideration if they had been presented properly to the sentencing judge.
>
> (445 U.S. at 559).

Justice Brennan's entire concurring opinion was devoted to the Fifth Amendment issue. He stated:

> The principal divisive issue in this case is whether petitioner's silence should have been understood to imply continued solicitude for his former criminal enterprise, rather than assertion of the Fifth Amendment right against self-incrimination or fear of retaliation.
>
> (445 U.S. at 562).

The above statement strongly implies that the Fifth Amendment forbids the enhancement of the sentence because the convicted defendant asserted his right to silence.

Justice Marshall unequivocally stated the same principle:

> There can be no doubt that a judge would be barred from increasing the length of a jail sentence because of a defendant's refusal to cooperate based on the constitutional privilege against self-incrimination. In such a case, the threat of a longer sentence of imprisonment would plainly be compulsion within the meaning of the Fifth Amendment. Cf. *McGautha v. California*, 402 U.S. 183 (1971). Such an aggravation of sentence would amount to an impermissible penalty imposed solely because of the defendant's assertion of the Fifth Amendment privilege.
>
> (445 U.S. at 564)

The principle stated by Justice Marshall was applied in *United States v. Rodriquez*, 496 F.2d 302 (5th Cir. 1974); *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966); *United States v. Acosta*, 501 F.2d 1130 (5th Cir. 1974); *United States v. Lacs*, 499 F.2d 922 (5th Cir. 1975); *United States v. Wright*, 533 F.2d 214 (5th Cir. 1976); *United States v. Adoiva*, 555 F.2d 353 (3d Cir. 1977); *Bertrand v. United States*, 467 F.2d 907 (5th Cir. 1972); *United States v. Moore*, 427 F.2d 36 (5th Cir. 1972); *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974).

Perhaps this court will take the opportunity to resolve the issue which piqued its interest in *Roberts*.

The Supreme Court of Florida attempted to distinguish the issue raised by the Florida Statute from the issue discussed by this Court in *Roberts*. The Supreme Court of Florida stated:

> We conclude, however, that for Fifth Amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted defendant as a result of his lack of cooperation. The former is no different from a gratuitous sentence reduction offered to one already incarcerated who without statutory sanction, risks incrimination in exchange for early release benefits.
>
> (395 So.2d at 520).

The argument that the Supreme Court of Florida advances is immaterial for it is not germain to the Fifth Amendment issue. There is no distinction between the coercion generated by the threat to enhance the sentence, yet to be pronounced, if the convicted defendant refuses to cooperate, and the coercion generated by threat that the convicted defendant will not be eligible for a reduction of a contingent sentence if he refuses to cooperate. The coercive impact is the same whether punishment is enhanced or leniency withheld.

In *Roberts v. United States, supra*, this Court recognized that the distinction is not principled. This Court stated:

> We doubt that a principled distinction may be drawn between "enhancing" the punishment imposed upon the petitioner and denying him the "leniency" he claims would be appropriate if he had cooperated.
>
> (445 U.S. at 557 footnote 4)

Thus the Fifth Amendment issue discussed by this Court in *Roberts* is substantially the same as the Fifth Amendment issue raised by the Florida Statute. This Court's discussion in *Roberts* is applicable.

The Supreme Court of Florida held that the statute did not violate the Fifth Amendment on the following basis:

> We reject this argument primarily because it depends on the unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those of which he has already been convicted (and for which no Fifth Amendment privilege is obviously necessary).
>
> (395 So.2d at 519).

This Court recognized in *Roberts* that information given the prosecutor to aid in the prosecution of others is potentially self-incriminating to the donor. This Court stated:

He (Roberts) rather contends that his failure to cooperate was justified by legitimate fears of physical retaliation and self-incrimination. In view of these concerns, petitioner asserts that his refusal to act as an informer has no bearing on his prospects for rehabilitation. He also believes that the District Court punished him for exercising his Fifth Amendment privilege against self-incrimination.

These arguments would have merited serious consideration if they had been presented properly to the sentencing judge.

(445 U.S. at 559).

Justice Marshall in his dissenting opinion stated:

The majority does not dispute that a failure to disclose the identity of others may often stem from desire to avoid self-incrimination.

(445 U.S. at 564.)

Obviously, this Court considered that the potential for self-incrimination was sufficient to raise the Fifth Amendment issue and merit discussion.

The decision of the Supreme Court of Florida is in opposition to this Courts' discussion in *Roberts* and is also in opposition to the principle of law applied by this Court in *United States v. Jackson*, 390 U.S. 570; 88 S.Ct. 1209; 20 L.Ed.2d 138 (1968). That principle is that a statute is unconstitutional if it unnecessarily penalizes the assertion of a constitutional right. The Florida Statute unnecessarily penalizes the assertion of the right to silence for the information sought may be

obtained without violation of the Fifth Amendment by procedures used in investigations conducted by grand juries.

The decision of the Supreme Court of Florida is also in opposition to the well established principle that a statute which coerces a witness to produce self-incriminating testimony without grant of immunity violates the Fifth Amendment. *Kastigar v. United States*, 406 U.S. 441 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1962); *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 625, 17 L.Ed.2d 564 (1967); *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1962).

Portions of the Legislative Record of the Florida statute show that purpose of the legislative was to produce a statute which would coerce cooperation Appendix hereto, p. 11. The legislature changed the previous law by the imposition of mandatory minimum terms and the prohibition of suspension of sentence or consideration of parole for the term in order to provide coercive power to the prosecution. Since the statute is coercive and since it does not grant immunity, it violates the Fifth Amendment.

The Supreme Court of Florida suggests that the Florida statute is no different than "a gratuitous sentence reduction offered to one already incarcerated who, without statutory sanction, risks incrimination in exchange for early release benefits" (395 So.2d 520). The difference is manifest. Presumably the situation suggested by the Supreme Court of Florida did not involve coercion. As shown above the Florida statute is coercive, does not

afford immunity and thus violates the Fifth Amendment. *Kastigar v. United States, supra.*

Government has the right to obtain information from witnesses which may be used to prosecute others. However, the process must not violate the Constitution. The traditional process is an investigation by the grand jury. In Florida, the prosecutor may act as a one man grand jury with all the power of a full grand jury. (Florida Statute Section 27.04 (1979) Appendix hereto, p. 12, *infra.*

The Florida Statute 893.135 is designed to accomplish the same purpose—acquisition of information. The Florida statute is not more efficient nor more powerful than a prosecutor acting as a one man grand jury. In fact a prosecutor in this capacity could probably obtain more information because the witness would be more inclined to cooperate when given immunity and more inclined to cooperate to avoid punishment for contempt.

The prosecutor could accomplish the purpose without the constitutional violations described herein.

Thus the statute is not needed and it is unconstitutional. Since the Florida Supreme Court has held the statute to be constitutional, similar statutes probably will appear in other states. Testing the constitutionality of these statutes will tax the time of both state and federal courts. If this Court accepts jurisdiction, its decision, whether pro or con, will promote judicial and legislative economy. The question is substantial, for at issue, is the heart of the protection afforded by the Fifth Amendment.

The Florida Supreme Court was confronted with the additional issue of whether the statute violates the Due Process Clause of the Fourteenth Amendment, and the right to assistance of counsel and a public trial guaranteed by the Sixth and Fourteenth Amendments and the right to access to the courts to seek redress of grievances guaranteed by the First and Fourteenth Amendments where the language of the statute requiring "substantial assistance" is vague, and where the statute does not provide that a hearing must be conducted to determine the final sentence, where if a hearing is conducted to determine the final sentence, the statute does not provide that the convicted defendant nor his counsel may be present, and the statute provides that the hearing may be conducted in camera.

Due Process of law is required at sentencing. *Mempha v. Ray*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). In *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 497, 51 L.Ed.2d 393 (1977) this Court stated:

> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to effective assistance of counsel. 430 U.S. 358.

Due Process of law requires a hearing; that the accused receive notice and be present and he be given an opportunity to be heard. *Gagnon v. Scarpelli*, 441 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656, (1973); *Morrissey*

v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Greenholtz v. Inmates of Nebraska Penitentiary* ____ U.S. ____, 99 S.Ct. 2100 (1979); *Specht v. Patterson*, 386 U.S. 504, 87 S.Ct. 1290, 18 L.Ed.2d 326 (1967). Due Process requires representation by counsel at sentencing, *Gardner v. Florida, supra, Mempha v. Ray, supra.*

It is not clear that the Florida Statute requires the court to conduct a hearing to determine the final sentence. If a hearing is conducted, the statute does not require that the convicted defendant receive notice nor that he have the right to be present and be heard, nor the right to counsel. The statute deprives the convicted defendant of due process of law at sentencing.

The Supreme Court of Florida stated in its opinion, that the statute did not prohibit the presence of the convicted defendant. (395 So. 24 at 519).

This position is contrary to the intent of the Florida Legislature for an amendment providing for that the convicted defendant be granted the right to be present at the hearing was defeated Appendix p. 1.

Further, the statute denies due process of law because the critical term "substantial assistance" is impermissibly vague. The convicted defendant may qualify for a less severe sentence, if and only if, he affords the prosecutor "substantial assistance". If the convicted defendant divulges potentially self-incriminating information to the prosecutor in return for receiving a less severe sentence, the prosecutor may refuse to move the court if he deems the assistance afforded to be less than substantial. If the prosecutor moves the

court, the court may refuse to sentence the convicted defendant to a less severe sentence if the court deems the assistance afforded the prosecutor to be less than sustantial. In either event, the convicted defendant could not meaningfully contest because the term "substantial assistance" is so vague that it does not afford an ascertainable standard by which a decision of the prosecutor or judge could be reviewed. *Papachristo v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 210 (1972). The principle is not limited to constitutional review of substantive criminal statutes. Where a sentencing statute does not provide ascertainable standards and thus may be applied in a discriminatory and capricious fashion it fails to afford due process of law. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The statute denies the convicted defendant due process of law.

The statute does not provide that the convicted defendant may be present at the hearing. Thus the statute deprives him of access to the courts mandated by the First Amendment. The statute provides that the hearing may be conducted in camera, thus depriving the convicted defendant of a public hearing mandated by the Sixth Amendment. The statute provides that the arresting agency may attend and present testimony of aggravating and mitigating circumstances. The statute does not provide that the convicted defendant nor his attorney may be present.

Thus the statute denies the Sixth Amendment right of assistance of counsel. *Mempha v. Ray, supra, Gardner v. Florida, supra.*

The Florida legislature made no attempt to protect the constitutional rights discussed herein. The rational of the legislature may have been that the sentencing process with all constitutional safeguards had already been completed and the process discussed herein is not part of the sentencing process.

To the contrary, that process is the most critical part of the sentencing process.

First the court imposes a sentence which is not final but contingent upon subsequent events described in the statute. If the convicted defendant affords substantial assistance to the prosecutor, and if the prosecutor moves the court, the court may then have a hearing wherein the arresting agency may present testimony of aggravating or mitigating circumstances. The court may then suspend the contingent sentence or sentence the convicted defendant to a lesser term than the contingent sentence, or allow the terms of the contingent sentence to stand and be final. The pronouncement by the court at this hearing is the final sentence, the actual sentence, the sentence that counts. Obviously this process is the most critical part of the sentencing procedure. A decision of this court in a case which involved a similar fact pattern substantiates the above analysis. *United States v. Behrens*, 375 U.S. 162, 84 S.Ct. 295, 11 L.Ed.2d 224 (1963). In that case a convicted defendant had been sentenced to a mandatory term. A statute provided for discretionary modification of the sentence after a three to six month study of the behavior of the convicted defendant. Upon receipt of a report from the Bureau of Prisons, the court reduced sentence. This court, without resort to constitutional safeguards held that Rule 32(a) of the Federal Rules of

Criminal Procedure requires the presence of both the convicted defendant and his counsel "when the sentence that counts is pronounced". (375 U.S. at 166).

The Supreme Court of Florida, in a different context, described the process under discussion as a "post conviction form of plea bargaining". (395 So.2d 518). This characterization of the process does not dispense with the constitutional constraints previously discussed for plea bargaining is a critical stage and the right to due process and to assistance of counsel is constitutionally mandated. *Cooper v. New York*, 594 F.2d 12, 16, 17 (4th Cir. 1979).

Further, the Supreme Court of Florida erred in characterizing the process as a "post conviction plea bargain". It is not. If, during classical "plea bargaining", an agreement is reached, and if the defendant pleads, but the prosecutor refuses to present the bargain to the court, the plea may be withdrawn. If the court rejects the bargain, the plea may be withdrawn. If either the prosecutor or the court renigs, the plea may be withdrawn—or in some cases the bargain is enforced in the interests of the defendant. Under the Florida statute, if any of the above circumstances obtain, the convicted defendant has no recourse and the information that he divulged may be used to prosecute him. Plea bargaining does not necessarily involve divulging information of collateral acts which may be self-incriminating. Under the statute the convicted defendant is required to divulge information concerning others which may be potentially self-incriminating. The fundamental difference between a "classical plea bargain" and the process described in the Florida statute is that under the statute no bargain is struck. After the convicted

defendant cooperates, neither the prosecutor nor the judge is obligated in any way. The convicted defendant acts at his own risk without recourse or right of retraction.

It makes no difference how the process is characterized or labeled. The same mischief which may occur at sentencing and necessitates constitutional safeguards, obtains in the process under discussion.

The question is substantial. The issue is whether the constitutional safeguards mandated at sentencing may be circumvented at the final stage of sentencing where the final sentence, the actual sentence, the sentence that counts is determined.

Pursuant to the Florida statute a convicted defendant who does not cooperate because he chooses to assert his right to silence, or because he has no information of value to the prosecution, is automatically sentenced to a mandatory minimum term.

The issue is whether the statute violates the Eighth and Fourteenth Amendments prohibition of cruel and unusual punishment where (a) the statute precludes the consideration of the characteristics of the individual defendant and causes the least culpable defendant to be sentenced to a more severe term, (b) the statute precludes the exercise of discretion in the determination of the sentence and (c) the statute precludes the exercise of discretion during the term of the sentence.

The consideration of the characteristics of the individual defendant is constitutionally required in capital cases. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726,

33 L.Ed.2d 346 (1972); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 444 (1976). The principle has been applied in non-capital cases. *Davis v. Zahradrick*, 432 Supp. 444, 450 (1977) wherein the court stated:

> Thus while the maximum sentences under the Virginia statute may not constitute cruel and unusual punishment in most cases, this court has absolutely no difficulty with the proposition that the assessment to be made in the instant case must, by necessity, incorporate petitioner's individual circumstances. Cf. *Furman v. Georgia* 408 U.S. at 273.

Under the Florida statute the characteristics of the individual may not be considered. The only factor which is considered is whether the defendant afforded substantial assistance.

It is ironic that the consideration of this factor exascerbates the cruelty generated by the statute. The statute requires that the least culpable defendant, a first offender who has no associates and thus no information of value to the prosecution, receives a more severe sentence than the more culpable experienced defendant.

This court has held that statutes which preclude the exercise of discretion in determining whether the death sentence should be imposed violated the Eighth Amendment. *Woodson v. North Carolina, supra; Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976); *Cocker v. Georgia*, 433 U.S. 584, 97 S.Ct. 286, 53 L.Ed.2d 982 (1977); *Lockett v. Ohio*, 438 U.S. 586, 98

S.Ct. 2954, 57 L.Ed.2d 937 (1978); *Gardner v. Florida, supra.*

The Supreme Court of Florida, citing its decision in *McArthur v. State*, 351 So.2d 972 (Fla. 1977) stated that the above principle is applicable only when the defendant is sentenced to death. (395 So.2d at 516, 517). Language in *Woodson v. North Carolina, supra,* could be construed to imply such a limitation.

> This conclusion (the exercise of discretion is constitutionally required) rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long.
>
> (428 U.S. at 305).

However, *Lockett v. Ohio, supra,* contains the following statement:

> The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various post conviction remedies, may be available to modify an initial sentence of confinement in non-capital cases. *The nonavailability of corrective or modifying mechanisms with respect of an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.* (Emphasis added).
>
> (348 U.S. at 605).

A statute which precludes the exercise of discretion in capital cases is unconstitutional for the corrective and modifying mechanisms of the criminal justice system are not available after death. There is reason to hold that the Florida statute is unconstitutional for it precludes the exercise of discretion in the determination of whether to sentence a defendant to a mandatory minimum term where the usual corrective and modifying mechanisms are not available during the term.

The Florida Statute precludes the exercise of discretion in the determination of the sentence and further the Florida statute precludes the exercise of discretion during the term of the sentence for the defendant is not eligible for parole.

California courts have held that even though discretion was exercised in the sentencing process, a long term mandatory sentence is unconstitutional for it precludes the exercise of discretion during the term of the sentence. *In re Foss*, 533 P.2d 590 (Calif. 1974) held that a sentence which precluded the consideration of parole for ten years was cruel and unusual. The court in *In re Grant*, 553 P.2d 590 (Calif. 1976) was presented with the issue of whether a particular mandatory sentence was unconstitutional. The court expanded its decision beyond the specific sentence and stated that all provisions of the California Health and Safety Code which precluded the consideration for parole for five years were violative of California Constitution.

The concept of the exercise of judicial discretion in the determination of the sentence and the exercise of discretion by parole authorities after sentencing is a vital part of our system of jurisprudence. Whether it is

so fundamental a part as to be constitutionally required in non-capital cases is a substantial question.

The final issue is whether the statute violates the Equal Protection Clause of the Fourteenth Amendment when the statute permits the more experienced and the more informed, and thus the more culpable defendant to be eligible for non-mandatory minimum terms, but requires that the least culpable defendant with no previous experience or associations be sentenced to a mandatory minimum term.

This court in *Skinner v. State of Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110 (1942) held that a statute which provided for greater punishment (sterilization) for multiple convictions of larceny than for multiple convictions of embezzlement violated the Equal Protection Clause. This court stated:

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilize one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Obviously this principle would apply with greater force where, as in the instant case, the least culpable is punished more harshly.

The Supreme Court of Florida held that the statute did not deny equal protection of the laws, stating:

> Appellees' suggestion that subsection (3) denies equal protection of the law to convicted

defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. See *Hamilton v. State*, 366 So.2d 8 (Fla. 1978).

There is a reasonable basis for division of convicted defendants into a class which chooses to cooperate and a class which chooses not to cooperate.[1] However, the statute punishes a third class—those who do not choose to refuse but have no information to divulge. There is no rational basis for grouping such defendants within the class of those who choose to refuse. The result is to punish the least culpable without a reasonable basis for doing so. Thus the statute denies the third class equal protection of the law.

The issue is whether a statute may withstand constitutional attack because there is a rational basis for its primary classifications, but where it denies equal protection to a separate and distinct third class which is incorrectly included within one of the primary classes. Unless this issue is resolved, the scope, if not the meaning of the Equal Protection Clause will be in doubt and subject to abuse. The question is substantial.

---

[1]Of course, as asserted previously, convicted defendant should not be penalized if his refusal is based upon his Fifth Amendment right to silence.

CONCLUSION

For the reasons stated upon the question is substantial and this Court should note probable jurisdiction of this appeal.

LAW OFFICES OF
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BY: Philip Carlton, Jr.
PHILIP CARLTON, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September, 1981, copies of this Jurisdictional Statement were mailed First Class Postage Prepaid to the Office of the Attorney General, Tallahassee Office, The Capitol, Tallahassee, Florida, 32301 and Assistant Attorney General, Calvin Fox, Esquire, 401 N.W. 2nd Avenue, Room 820, Miami, Florida, 33128.

I FURTHER CERTIFY that all parties required to be served have been served.

Philip Carlton, Jr.

PHILIP CARLTON, JR.

Appendix

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[MAY 3 1981]

Supreme Court of Florida

No. 58,199

STATE OF FLORIDA,

Appellant,

vs.

WILLIAM DANIEL COWGILL, WILLIAM EUGENE COX, TERRY VON SMITH, VINCENT DOYLE, DANNY ROBINSON, JERRY STUBBLEFIELD and RONALD FARACE,

Appellees.

[April 30, 1981]

PER CURIAM.

The order of the Circuit Court of the Seventeenth Judicial Circuit granting appellees' motion to dismiss and declaring section 893.135, Florida Statutes (1979), unconstitutional is reversed, and the cause remanded for further proceedings not inconsistent with *State v. Benitez*, No. 57,834 (Fla. Feb. 12, 1981).

It is so ordered.

SUNDBERG, C. J., ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court
in and for Broward County,

Leroy H. Moe, Judge
Case No. 79-7389CF A-F & I

Jim Smith, Attorney General, and Stewart J. Bellus, Assistant Attorney General, West Palm Beach, Florida,

for Appellant

Philip Carlton, Jr. of the Law Offices of Philip Carlton, Jr., Miami, Florida,

for Appellees

SUPREME COURT OF FLORIDA

No. 57,834

STATE OF FLORIDA,

Appellant,

vs.

CARLOS M. BENITEZ and ESPERANZA BENITEZ,

Appellees.

[February 12, 1981]

ENGLAND, J.

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979)—Florida's newly-enacted "drug trafficking" statute—is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's rulings.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of

the new law establishes severe mandatory minimum sentences for trafficking in various types of illegal drugs. Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law, and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law enforcement authorities in the detection or apprehension of others involved in drug trafficking.

Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the "pusher" on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement authorities and become informers. No one argues that the elimination of illegal drug traffic is not a beneficial and worthwhile goal, or that the goals of this legislation are not meritorious.

Nonetheless, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, legislators knowingly glossed over alleged constitutional defects in the approach that was being developed. We in the judiciary do not have that luxury. Indeed, the trial judge's extensive and detailed order exhibits the multiple, serious difficulties which this statute poses under well-established constitutional principles. We

discern six major challenges to the constitutionality of section 893.135, one directed at the mandatory penalties and five directed at the escape valve in subsection (3). The state also half-heartedly challenges the appellees' standing for the first time on this appeal. This last challenge being the easiest to treat, we discuss it first.

1. Standing

The basic rule governing the standing of parties challenging statutory enactments was recently stated in *Sandstrom v. Leader*, 370 So.2d 3, 4 (Fla. 1979):

> Fundamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights. . . . Such a personal stake in the outcome of the controversy is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" (citations omitted).

The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty-oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. *See State v.*

Millington, 377 So.2d 685 (Fla. 1979); *State v. Champe*, 373 So.2d 874 (Fla. 1978).

2. Cruel and Unusual Punishment

Appellees argue that the mandatory minimum sentences of section 893.135(1) violate the cruel and unusual punishment clauses of the state[1] and federal[2] constitutions. Relying on various death penalty decisions of the United States Supreme Court,[3] they first contend that the mandatory minimum sentences unconstitutionally eliminate the exercise of discretion in sentencing. This argument was rejected by this Court in *McArthur v. State*, 351 So.2d 972 (Fla. 1977), and warrants no further discussion here.

Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. *See, e.g., McArthur v. State*, 351 So.2d 972 (Fla. 1977); *Banks v. State*, 342 So.2d 469 (Fla. 1976); *O'Donnell v. State*, 326 So.2d 4 (Fla. 1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties

[1]Art. 1, §17, Fla. Const.

[2]U.S. Const. amend. VIII.

[3]Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

for violations of the law. While it is often said that in an extreme case—wherein the sentence was *grossly* disproportionate to the severity of the crime—the legislature's judgment would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

The recent decision of the United States Supreme Court in *Rummel v. Estelle*, 100 S.Ct. 1133 (U.S. 1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

> [t]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime. . . . In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. . . . Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.
>
> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id. at 1138 (citations omitted). After analyzing one of these rare successful challenges, *Weems v. United States*, 217 U.S. 349 (1910), the majority concluded:

> Given the unique nature of the punishments considered in *Weems* and in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Id. at 1139 (footnote omitted).

The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. *See McArthur v. State; O'Donnell v. State; accord, People v. Broadie*, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S. 2d 471, *cert denied*, 423 U.S. 950 (1975).

3. Due Process-Vagueness

Little discussion is needed concerning appellees' suggestion that subsection (3) is impermissibly vague in defining a convicted defendant who is eligible for lenient treatment as "any person . . . who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Being a description of a *post-conviction* form of plea bargaining rather than a

definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. *Cf. Linville v. State*, 359 So.2d 450 (Fla. 1978) (statutory definition of proscribed activity held unconstitutionally vague). The contested phrase, in any event, is susceptible of common understanding in the context of the whole statute. *Schultz v. State*, 361 So.2d 416 (Fla. 1978). There is no due process infirmity.

4. Equal Protection

Appellees' suggestion that subsection (3) denies equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. *See Hamilton v. State*, 366 So.2d 8 (Fla. 1978).

5. Separation of Powers

Two basic arguments by appellees are directed at Florida's constitutional separation of governmental powers. Art. II, §3, Fla. Const. First, they assert that subsection (3) encroaches on the Court's rule-making role, Art. v. §2(a), Fla. Const., in that it conflicts with Rule 3.800(b), Rule 3.720(b), and Rule 3.171 of the Florida Rules of Criminal Procedure. The statute differs from these rules, of course, but it in no way so conflicts with them as to offend the constitution.

Rule 3.800(b) permits the reduction of legal sentences, yet since it specifically excludes minimum mandatory sentences from its operation, its procedures obviously are not incompatible with section 893.135. Likewise,

Rules 3.720(b) and 3.171 do not pose any obstacle to the operation of section 893.135. Rule 3.720(b) provides that at a sentencing hearing, the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence . . . ." Subsection (3) states that "[t]he arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any [motion for reduction or suspension of sentence]." The statute does not explicitly exclude the defendant from submitting evidence in his behalf, and it does not offend the statutory scheme to afford him that right. Finally, applicable procedural safeguards in Rule 3.171 can be afforded to defendants, to the extent they do not conflict with the explicit language of subsection (3). No infirmity of constitutional dimension attends the omission of those that do.

Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." *People v. Eason*, 40 N.Y.2d 297, 301, 353 N.E.2d 587, 598, 386 N.Y.S.2d 673, 676 (1976) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws).

6. Self-incrimination

Finally, the appellees argue that section 893.135 coerces a defendant into relinquishing his fifth amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with the authorities. We reject this argument, primarily because it depends on unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no fifth amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisdictions. Nonetheless, a defendant need not invoke subsection (3), as nothing in the statute is compulsive. Putting a defendant to a difficult choice is not necessarily forbidden by the fifth amendment. *See, e.g., Corbitt v. New Jersey*, 99 S.Ct. 492, 497 (U.S. 1978) ("[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." (footnote omitted)); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *McGautha v. California*, 402 U.S. 183 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of subsection (3).

With respect to those cases which say that the trial courts may not enhance a sentence based on a defendant's failure to cooperate with the authorities, *see United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976); *United States v. Acosta*, 501 F.2d 1330 (5th Cir. 1974) (Gee, J., dissenting), *adopted en banc*, 509 F.2d 539 (5th Cir.), *cert. denied*, 423 U.S. 891 (1975); *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975), we believe that *Roberts v. United*

States, 100 S.Ct. 1358 (U.S. 1980), went a long way toward resolving this issue against appellees. The Court in *Roberts* concluded that the district court properly considered the defendant's refusal to cooperate as one factor in imposing consecutive sentences. Admittedly, a fifth amendment claim was not properly raised in *Roberts* and "would have merited serious consideration" if it had been. *Id.* at 1364. We conclude, however, that for fifth amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted defendant as a result of his lack of cooperation. The former is no different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Our disposition of appellees' challenges obviates the need to consider the severability of subsection (3) from the statute. We hold that section 893.135 is constitutional. The order of the trial court is reversed, and the case is remanded for further proceedings.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Dade County,

Case No. 79-10646

Jon I. Gordon, Judge

Jim Smith, Attorney General, and Calvin L. Fox, Assistant Attorney General, Miami, Florida; and Janet Reno, State Attorney, and Arthur Joel Berger, Assistant State Attorney, Miami, Florida,

for Appellant

Joseph Beeler, Miami, Florida, and Brian Richard McComb, Miami, Florida,

for Appellees

Philip Carlton, Jr. of the Law Offices of Philip Carlton, Jr., Miami, Florida, for Daniel Cowgill, Amicus Curiae

[APR 15 1981]

SUPREME COURT OF FLORIDA

MONDAY, APRIL 13, 1981

CASE NO. 57,834

Circuit Court No. 79-10646
(Dade)

STATE OF FLORIDA,

Appellant,

v.

CARLOS M. BENITEZ and
EXPERANZA BENITEZ,

Appellees.

Upon consideration of the Motion for Rehearing of Clarification of Decision filed by attorney for Appellees and Petition for Rehearing filed by the attorney for amicus curiae Daniel Cowgill,

IT IS ORDERED that said Motion and Petition be and the same are hereby denied.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By /s/ Tanya Carrsee
Deputy Clerk

TC
cc: Hon. Richard P. Brinker, Clerk
Hon. Jon I. Gordon, Judge

Joseph Beeler, Esquire
Philip Carlton, Jr., Esquire
Calvin L. Fox, Esquire
Hon. Janet Reno
Brian Richard McComb, Esquire

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT IN
AND FOR BROWARD COUNTY, FLORIDA

CASE NUMBER: 79-7389-CF

THE STATE OF FLORIDA,

Plaintiff,

vs.

WILLIAM DANIEL COWGILL, WILLIAM EUGENE COX, TERRY VON SMITH, VINCENT DOYLE, DANNY ROBINSON, JERRY STUBBLEFIELD and RONALD FARACE,

Defendants.

ORDER

THIS CAUSE having come on to be heard upon the Defendants' Motions to Dismiss the Information pending against them, and the Court having heard argument of counsel and being otherwise fully advised in the premises thereof, it is hereby

ORDERED AND ADJUDGED that subsection (3) of §893.135, Fla. Statutes, is declared invalid and unconstitutional for the following reasons:

1. §893.135 imposes stiff mandatory fines and harsh mandatory minimum sentences without parole or other mitigation for trafficking in controlled substances. However, if a defendant convicted under this Statute provides "substantial assistance" in the identification,

arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals, he "may" receive a reduced or suspended sentence.

This Court holds that the use of the term "substantial assistance" in Subsection (3) of §893.135, Fla. Statutes, renders the statute violative of the due process clause of Article I, Section 9, of the Florida Constitution and the Fifth Amendment of the United States Constitution. The term is vague and indefinite. Nowhere in §893.135 is the term "substantial assistance" defined. Morover, a review of the legislative transcripts of the hearings and proceedings which took place prior to the passage of the statute demonstrates that a number of legislators had a serious concern as to the workability of the term "substantial assistance".

2. Subsection (3) of §893.135, Fla. Statutes, is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution. Under this Statute, a convicted person may receive a reduced or suspended sentence *if* he provides "substantial assistance" in the investigation and prosecution of others, and then only *if* the State Attorney moves the sentencing court to reduce or suspend the sentence. However, the obvious problem with this statute is that a person convicted under it may very well be not able to furnish *any* assistance, let alone *substantial* assistance, in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. Thus subsection (3) clearly discriminates against a defendant who simply cannot provide substantial assistance to law enforcement authorities. In essence, if a defendant has someone to "squeal" on, this person can receive a reduced or suspended sentence. However,

on the other hand, if a defendant simply does not have anyone to "squeal" on, he cannot receive a reduced or suspended sentence. Consequently, in light of this realistic possibility, if not probability, this Court holds that subsection (3) of §893.135, Fla. Statutes, violates an accused's constitutional right to be equally protected under the law.

3. Subsection (3) of §893.135, Fla. Statutes, is violative of the separation of powers doctrine contained in Article II, Section 3, of the Florida Constitution in that it invests the State Attorney, as part of the Executive Branch, with unbridled and unfettered discretion so as to encroach upon the judicial sentencing functions. Under Subsection (3), the decision as to whether or not to move the sentencing court for a reduction or suspension of sentence is left entirely in the discretion of the State Attorney. Only the State Attorney may move the sentencing court for a reduction or suspension of sentence after, in the State Attorney's subjective opinion, a convicted defendant has provided substantial assistance in the criminal investigation of others. Until such time, the sentencing court has absolutely no power to reduce or suspend a defendant's sentence. Such legislative delegation of authority to the State Attorney's Office and encroachment of the judicial branch is improper. *Thompson v. State*, 342 So.2d 52, 55 (Fla. 1977).

Subsection (3) of §893.135, Fla. Statutes, effectively permits the State Attorney to control the sentence of a defendant and to determine what punishment is proper for the defendant. However, the determination of penalties to be imposed is not an executive function, but rather a legislative one. *Hamilton v. State*, 366 So.2d 8, 11 (Fla. 1978). This Court adopts rulings from other jurisdictions

which hold that a statute that permits the prosecutor to have control over the sentence imposed is unconstitutional. *Spalding v. State*, 330 NE 2d 774, 777 (Ind. App. 1975); *People v. Superior Court*, 130 Cal. Rptr. 548 (Cal. App. 1976); *People v. Fredricks*, 362 NY Supp. 2d 92 (1974).

4. Subsection (3) of §893.135, Fla. Statutes, is violative of the privilege against self-incrimination guaranteed every person by Article I, Section 9 of the Florida Constitution, as well as the Fifth and Fourteenth Amendments to the United States Constitution. The effect of Subsection (3) is to coerce a convicted defendant into disclosing information in order to receive a reduced or suspended sentence. In essence, it requires the defendant to "squeal" on others involved in drug activities in order to escape mandatory minimum sentences and stiff fines. This effect is constitutionally impermissible.

In *United States v. Rogers*, 504 F.2d 1079, 1085 (5th Cir. 1974), Cert. denied, 422 U.S. 1042, the trial court sentence was vacated because of this type of coercion. The Fifth Circuit Court of Appeals stated:

> "At the time of the sentence, the Court clearly indicated it's distaste for Rogers' lack of cooperation in identifying his confederates, especially in the face of the jury's findings that a conspiracy existed. It gave Rogers to understand that the first steps towards rehabilitation, in its' opinion was to cooperate with authorities in bringing others involved in a conspiracy to justice and unless and until Rogers indicated substantial, material,

productive cooperation, the Court would not consider a lesser sentence.

* * * * *

When it has been made to appear that longer sentences have been imposed by the Courts because defendants refused to confess their guilt and persisted in their claims of innocence, we have vacated their sentences. (Citations omitted.) Until now, we have had no occasion to address ourselves to the situation *sub judice*, where the trial court did not ask Rogers to directly confess his guilt, but rather to "sing" about others involved in the conspiracy. But we view this as a distinction without a difference."

It is well-established law that it is improper for a penalty to be imposed on the basis that the defendant did not "come clean" or otherwise cooperate with government officials. See *U.S. v. Adams*, 555 F.2d 353 (3rd Cir. 1977); *U.S. v. Rodriguez*, 498 F.2d 302 (5th Cir. 1974); *U.S. v. Laca*, 499 F.2d 922 (5th Cir. 1975). In *Rodriguez*, supra, the Fifth Circuit Court of Appeals held that a defendant retains important Fifth Amendment rights even *after* a jury verdict, and that a defendant therefore cannot be constitutionally placed in the position of either abandoning those rights or risking a harsher sentence. See also *U.S. v. Yurasovich*, 580 F.2d 1212 (3rd Cir. 1978).

Thus, to require a defendant to "come clean" effectively penalizes him for exercising his constitutional right to remain silent. *U.S. v. Wright*, 533 F.2d 214 (5th

Cir. 1976). In *U.S. v. Garcia*, 544 F.2d 681, 685 (3rd Cir. 1976), the Third Circuit Court of Appeals stated that "the quality of mercy is strained when it's price is abandonment of the classic freedom against self incrimination." In the *Garcia* case, the trial court placed improper weight on the defendant's requirement to reveal to the authorities his source of supply of cocaine in order to obtain leniency from the court when imposing its sentence. The Third Circuit Court of Appeals said at 685:

> "The appellants were put to a Hobson's choice: remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice; they had to waive the protection afforded them by the Fifth Amendment. This price was too high. We, therefore, cannot permit the sentences to stand."

This Court holds that the "price tag" set forth in Subsection (3) of §893.135, Fla. Statutes, is likewise too high since it requires a defendant to foresake his constitutional privilege against self-incrimination in order to receive less than the mandatory minimum sentence. Therefore, Subsection (3) of the aforementioned statute is hereby declared invalid and unconstitutional.

IF IS FURTHER ORDERED AND ADJUDGED that notwithstanding the "severability clause" contained in Section 3 of the Act (Chapter 79-1) which created §893.135, Fla. Statutes, Subsections (1) and (2) of §893.135, Fla. Statutes, cannot stand without Subsection (3). Thus,

Subsections (1) and (2) of §893.135 Fla. Statutes, are hereby also declared invalid and unconstitutional for the following reasons:

1. The test for severability was set forth by the Florida Supreme Court in *Cramp v. Board of Public Instruction of Orange County*, 137 So.2d 828 (Fla. 1962) as follows:

> "When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: 1) the unconstitutional provisions can be separated from the remaining valid provisions, 2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void.
>
> 3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other, and 4) an act complete in itself remains after the invalid provisions are stricken. . . . 137 So.2d at 830."

Moreover, in discussing the various tests for severability, Chief Justice England, in *State v. Lee*, 356 So.2d 276, 284 (Fla. 1978), stated, "The touchstone for severability under each of these formulations, . . . , is the 'intent' of the legislature with respect to the enactment as a whole."

2. Having reviewed the various transcripts of the legislative hearings and proceedings incident to

the passage of §893.135, Fla. Statutes, this Court finds that the second and third prongs of the test set forth in the *Cramp* case, supra, cannot be satisfied, nor the Legislature's intent accomplished by severing Subsection (3) of §893.135, Fla. Statutes. A careful review of the legislative history of §893.135, Fla. Statutes, clearly demonstrates that the Legislature's intent in passing this act was to apprehend the "higher echelon" drug figures by forcing the "lower echelon" drug figures to disclose information about such higher drug figures. However, without the inclusion of Subsection (3) in the statute, this legislative intent to apprehend the higher echelon drug figures is clearly defeated. Moreover, it is quite apparent that Subsection (3) of §893.135, Fla. Statutes, was an inducement to the enactment of the harsh mandatory minimum sentences provided for in Subsections (1) and (2) of the statute.

3. Severability clauses have become so commonplace that their significance should be considered minimal. See *Kapaun v. Federal Land Bank of Omaha*, 64 S.D. 635, 269 NW 564 (1936); See also *State v. Lee*, 356 So.2d, 276, 284, n. 3 (1978).

THEREFORE AND ACCORDINGLY, it is hereby declared that Subsections (1) and (2) of §893.135, Fla. Statutes, are nonseverable from Subsection (3) of §893.135. Consequently, §893.135, Fla. Statutes, is hereby declared unconstitutional in its entirety.

IT IS FURTHER ORDERED AND ADJUDGED that, for the foregoing reasons, the Defendants' Motions to Dismiss Counts I and II of the Information pending against them, be and the same are hereby granted.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, this _____ day of _____, 1979.

_____
CIRCUIT COURT JUDGE

Copies Furnished:
State Attorney's Office
Law Offices of Philip Carlton, Jr.

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NUMBER: 57,834

WILLIAM DANIEL COWGILL, et al.,
Appellants,

vs.

THE STATE OF FLORIDA,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that WILLIAM DANIEL COWGILL, et al, the Appellants above-named hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of Florida, affirming the Judgment of Conviction, entered herein April 30, 1981.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

LAW OFFICES OF
PHILIP CARLTON, JR.
19 West Flagler, Suite 220
Miami, Florida 33130
(305) 377-1471

BY: /s/ Thomas A. Wills
PHILIP CARLTON, JR.
Counsel for Appellants
THOMAS A. WILLS

I HEREBY CERTIFY that a true and correct copy of the Notice of Appeal to the Supreme Court of the United States was mailed to the Office of the Attorney General, 111 Georgia Street, Room 204, West Palm Beach, Florida, 33401; Office of the State Attorney, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, Florida, 33301 and the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128 this 16th day of July, 1981.

I FURTHER CERTIFY that all parties required to be served have been served.

/s/ Thomas A. Wills
PHILIP CARLTON, JR.
THOMAS A. WILLS

SUPREME COURT OF THE UNITED STATES

No. A-58

WILLIAM DANIEL COWGILL,

Appellant

v.

FLORIDA

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including September 27, 1981.

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 20th day of July, 1981.

CHAPTER 948

PROBATION

Sec.

948.01 When courts may place defendant on probation.

948.011 When court may impose fine and place on probation as to imprisonment.

948.02 Duties of parole and probation commission relating to probationers.

948.03 Terms and conditions of probation.

948.04 Period of probation; duty of probationer.

948.05 Court to admonish or commend probationer.

948.06 Violation of probation; revocation; modification; continuance.

948.07 Renumbered.

Cross References

Appeals by probationer, see §924.06.

Compacts with other states, see §§949.07, 949.08.

Constitutional provisions, see Const. Art. 4, §8(c).

Construction of law, see §949.04.

Federal laws, see 18 U.S.C.A. §§3651 to 3655.

Grant of parole or conditional releases, see Const. Art. 4, §8(c).

Parole and probation, generally, see §§947.01 to 947.26, 949.01 to 949.09.

Severability clause, see §949.05.

Short title, see §949.06.

Uniform law for out-of-state probation and parolee supervision, see §949.07 et seq.

Law Review Commentaries

Capital offenses: Bifurcated trials. 24 U.Fla.L.R. 127 (1971).

Citizen volunteers: Workable solution to probation problem. 45 Fla. Bar J. 476 (1971).

Florida's rehabilitative sex offender laws. John Wallace Hamilton, 15 U.Fla.L.R. 245 (1962).

Survey of criminal law in Florida. Thomas A. Wills, 16 U.Miami L.Rev. 225 (1961).

948.01 When courts may place defendant on probation

(1) Any court of the state having original jurisdiction of criminal actions, where the defendant in a criminal case has been found guilty by the verdict of a jury or has entered a plea of guilty or a plea of nolo contendere or has been found guilty by the court trying the case without a jury, except for an offense punishable by death, may at a time to be determined by the court, either with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of such defendant.

(2) Prior to such hearing the court may refer the case to the parole and probation commission for investigation and recommendation. The court, upon such reference, shall direct the commission and it shall be the duty of the commission to make an investigation and report in writing at a specified time to the court on the circumstances of the offense, the criminal record,

the social history, and the present condition of defendant together with its recommendation.

(3) If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt and in either case stay and withhold the imposition of sentence upon such defendant, and shall place him upon probation under the supervision and control of the commission for the duration of such probation. And the said commission shall thereupon and thereafter, during the continuance of such probation, have the supervision and control of the defendant.

(4) Whenever punishment by imprisonment in the county jail is prescribed, the court, in its discretion, may at the time of sentencing direct the defendant to be placed on probation upon completion of any specified period of such sentence. In such case, the court shall stay and withhold the imposition of the remainder of sentence imposed upon the defendant, and direct that the defendant be placed upon probation after serving such period as may be imposed by the court.

(5) In no case shall the imposition of sentence be suspended and the defendant thereupon placed on probation unless such defendant be placed under the custody of said commission.

The Florida Rules of Criminal Procedure were adopted March 1, 1967, to become effective January 1, 1968. The adopting order of the Supreme Court provided that conflicting rules and statutes were superseded. See Rule 3.790(a)(8), volume 33, F.S.A.

Historical Note

Derivation:

Laws 1967, c. 67-204, §1.
Laws 1967, c. 67-28, §1.
Laws 1965, c. 65-453, §1.
Laws 1961, c. 61-498, §1.
Laws 1959, c. 59-103, §1.
Laws 1945, c. 22858, §7.
Laws 1941, c. 20519, §20.

Laws 1941, c. 20519, §35, repealed all conflicting laws and parts of laws.

Laws 1945, c. 22858, §7, substituted, in former subsection (4) (now subsection (5)), the statutory reference "§949.03" for "§949.02".

Laws 1959, c. 59-130, §1, rewrote subsection (1) which read:

"The courts of the state having original jurisdiction of criminal actions, where the defendant in a criminal case has been found guilty upon verdict or plea, except for an offense punishable by death or life imprisonment,

may, at a time to be determined by the court, hear and determine the question of the probation of such defendant."

The 1959 law also amended subsection (3) by inserting, in the first sentence, "without adjudging the defendant to be guilty" following "in its discretion may" and substituted "withhold the adjudication of guilt and" for "suspend" following "thereupon stay and".

Laws 1961, c. 61-498, §1, substituted, in subsection (1), "either with or without an adjudication of the guilt of the defendant" for "without adjudging the defendant to be guilty" following "determined by the court"; substituted, in the first sentence of subsection (3), "either adjudge the defendant to be guilty or" for "without adjudging the defendant to be guilty" following "in its discretion, may"; and inserted "in either case stay and withhold" following "withhold the adjudication of guilt and".

The name "parole commission" was changed to "probation and parole commission" by authority of Laws 1965, c. 65-453, §1. See section 947.-01.

Laws 1967, c. 67-28, §1, and Laws 1967, c. 67-204, §1, renumbered former subsection (4) as subsection (5) and inserted subsection (4).

Cross References

Appeal by probationer, see §924.06.
Juvenile courts, see §949.01.

Law Review Commentaries

Adjudication of guilt, necessity in Florida. Granvel S. Kirkland, 12 U.Fla.L.R. 102 (1959).

Instruction as to possibility of parole as reversible error. 7 Miami L.Q. 120 (1952).

New parole and probation act. James T. Vocelle, 16 Fla.L.J. 9 (1942).

Parole and probation in Florida. James T. Vocelle, 18 Fla.L.J. 35 (1944).

Parole in Florida. Vernon G. Clark, 11 U.Fla.L.R. 68 (1958).

Rules of criminal procedure. Thomas A. Wills, 22 U.Miami L.Rev. 240, 272 (1967).

Sentence. Thomas A. Wills, 20 U.Miami L.Rev. 264 (1965).

Sentences in criminal cases. Thomas A. Wills, 14 U.Miami L.Rev. 501 (1960).

Library References

Criminal Law —982.1 et seq.

C.J.S. Criminal Law §§1571, 1618.

Notes of Decisions

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1. In general

There is clear distinction between "sentence," which must be preceded by adjudication of guilt, and "conditions of probation," which can be imposed independently of an adjudication of guilt and imposition or pronouncement of sentence. State v. Williams, App., 237 So.2d 69 (1970).

The whole underlying concept of probation centers around rehabilitation as contrasted in punishment and presupposes the fact that probationer is not in prison

confinement. Roy v. State, App., 207 So.2d 52 (1967), certiorari dismissed 211 So.2d 554.

A prisoner serving felony sentence in state prison could not be in custody of the probation and parole commission. Id.

The grant of probation to defendant is matter of grace and not of right. Pickman v. State, App., 155 So.2d 646 (1963), certiorari denied 164 So.2d 805.

Probation matters must be handled in accordance with legislative act because there is no probation except by legislative action. Id.

This section does not authorize court to impose sentence in portions but only to pronounce the whole sentence or to defer the whole until a probation order entered in lieu of it is vacated. Ex parte Bosso, 41 So.2d 322 (1949).

If court in felony prosecution exercises its discretion under statute and withholds imposition of sentence and places defendant on probation without adjudging him guilty, then he has not been convicted and does not lose any of his civil rights. Op.Atty. Gen., 064-163, Nov. 6, 1964.

A person found guilty of a felony in this state and placed on probation is not deprived of his civil rights in this state. Op.Atty.Gen., 1942, p. 784.

2. Construction and application

Criminal Procedure Rule 3.790 governs only procedural aspects of probation and augments but does not supersede this section, which provides that sentence may include period of probation under expressed circumstances, and does not authorize sentence to state prison to be followed by period of probation. Robinson v. State, App., 256 So.2d 390 (1972).

This section with respect to placing defendants on probation does not require elimination of all records of case when court withholds adjudication of guilt and places defendant on probation after he is found guilty or pleads guilty to offense. Mulkey v. Purdy, App., 234 So.2d 108 (1970).

In State v. Taylor, 151 Fla. 296, 9 So.2d 708 (1942), it was held that the trial court could not place on probation one convicted of second-degree murder for which a term of life imprisonment might be imposed, even though a lesser term of incarceration was allowable. However, in the later case of Parrish v. State, 153 Fla. 105, 14 So.2d 171 (1943), the Supreme Court said:

"The only question on this appeal is the identical question which was presented by the certified question of the trial court in the former proceeding here [State v. Taylor, 151 Fla. 296, 9 So.2d 708] viz.: 'Does a trial court have power to place on probation one adjudged guilty of second degree murder?'

"We answered that question in the negative. The answer to this question involved the construction of Section 20, Chapter 20519, Acts of 1941, F.S.A. §948.01(1),

the pertinent part of which is as follows: 'Section 20. When Courts May Place Defendant on Probation.— The courts of the State of Florida having original jurisdiction of criminal actions, where the defendant in a criminal case has been found guilty upon verdict or plea, except for an offense punishable by death or life imprisonment, may, at a time to be determined by the court, hear and determine the question of the probation of such defendant.'

"After further consideration of the provisions of the above-quoted portion of the statute, the majority of the court is not convinced that our holding in the opinion, supra, rendered on certified question is correct and it may be that upon the same question being presented in another case we would overrule the conclusion heretofore reached and may hold that the Circuit Court under this statute is precluded from exercising the power of probation only in those cases where the defendant has been found guilty upon verdict or plea of an offense which is punishable in the alternative by death or life imprisonment and is not precluded from exercising the power of probation in cases in which the penalty may be either life imprisonment or imprisonment for a less period of time.

"We, therefore, take occasion now to announce that we shall not in the future be held to be bound by our opinion and judgment herein referred to heretofore entered in this cause but will reconsider our construction of this statute when a case is presented in which we are free to do so."

3. Discretion

Grant of probation rests within broad discretion of trial judge and is a matter of grace, not of right. Martin v. State, App., 243 So.2d 189 (1971).

A grant of probation rests within broad discretion of trial judge and is based on hope of rehabilitation rather than punishment. Pickman v. State. App., 155 So.2d 646 (1963), certiorari denied 164 So.2d 805.

4. Jurisdiction

Trial court was authorized to set aside adjudication of guilt and place codefendant on probation under supervision of parole commission. State v. Dull, App., 249 So.2d 758 (1971).

Upon expiration of probationary period the court is divested of all jurisdiction over person of a probationer unless in the meantime the processes of the court have been set in motion for revocation or modification of probation pursuant to statute. Brooker v. State, App., 207 So.2d 478 (1968).

Where trial judge entered order which withheld adjudication of guilt and placed accused on probation, trial court could thereafter resume jurisdiction over the accused and enter other orders, including a judgment adjudicating guilt and passing sentence. Delaney v. State, 190 So.2d 578 (1966), appeal dismissed 87 S.Ct. 1710, 387 U.S. 426, 18 L.Ed.2d 866.

Where defendant pleaded guilty to breaking and entering with intent to commit misdemeanor, so that

court could have imposed maximum sentence of five years or placed him on probation for maximum of seven years, court did not have jurisdiction to withhold imposition of sentence from day to day and term to term, and then, 12 years later, to revoke order illegally suspending sentence and impose sentence. Helton v. State, 106 So.2d 79 (1958).

A court having jurisdiction of defendant in criminal proceeding may order probation after defendant has been convicted, but it has no jurisdiction or power to place defendant on parole, in view of fact that parole is strictly a function of the executive branch of government to be exercised only after defendant has been convicted and sentenced. Marsh v. Garwood, 65 So.2d 15 (1953).

Where an order of probation says nothing about whether the probationer may consult or seek the assistance of such agencies as alcoholic rehabilitation, guidance clinics, etc., the court that made such order does not have the authority to prohibit the Florida parole and probation commission from referring the probationer to such agencies without first obtaining a determination from the court that such reference is necessary. Op.Atty.Gen., 071-144, June 11, 1971.

A trial judge cannot release a prisoner for service in the armed forces of the United States. Op.Atty.Gen., 1943, p. 510.

5. Validity of sentence

Where defendant was sentenced for period of five years, portion of judgment which purported to suspend

sentence on certain conditions was void. McMahon v. Mayo, 92 So.2d 806 (1957).

Where defendant's sentence was improperly suspended, second sentence pronounced after revocation of suspension of sentence, was without authority and therefore of no effect. Id.

A court has no legal authority to sentence a defendant to serve a term of imprisonment in the state prison and direct that he be placed on probation after serving said sentence, where the sentence and the probation are for the same offense. If a court should undertake to do this, its order that the defendant be placed on probation would be void from its inception and would have no binding force or effect. Op.Atty.Gen., 072-136, April 18, 1972.

Criminal court has no authority to suspend or grant probation as to a part of a sentence to be imposed, but to place a defendant on probation, the court could, after finding defendant guilty, suspend imposition of sentence until further order. Op.Atty. Gen., 1949, p. 624.

6. Records of minors

Petitioner, who at age 17 plead guilty to misdemeanor of petit larceny, and was put on probation for 6 months, was not entitled to have his fingerprints, which sheriff had taken after petitioner's arrest, expunged, or to have court's docket entries of his case erased and court file thereon removed or sealed, though petitioner alleged that prospective employer informed him that it would not hire him unless such record was expunged. Burdy

v. Mulkey, App., 228 So.2d 132 (1969) writ discharged 234 So.2d 108.

7. Presentence investigation report

Presentence investigation report was confidential, and not a public document, and defendant was not entitled to access thereto. Morgan v. State, App., 142 So.2d 308 (1962).

8. Plea of guilty

Court may place on probation a defendant who has pleaded guilty or nolo contendere or been found guilty after trial without first entering a judgment of guilt. Delaney v. State, 190 So.2d 578 (1966), appeal dismissed 87 S.Ct. 1710, 387 U.S. 426, 18 L.Ed. 2d 866.

Purpose of the procedure whereby defendant, who has pleaded guilty or has been found guilty after trial may be placed on probation without a judgment of conviction being entered is to provide for the rehabilitation of one who has committed the crime without formally and judicially branding the individual as a convicted criminal with consequent loss of civil rights and other damning consequences. Id.

Where defendant was induced to plead guilty of buying, receiving, and aiding in concealment of stolen property by county solicitor's assurance that he would be placed on probation, which was granted for seven years, though solicitor knew of defendant's prior conviction in federal court for unlawfully receiving stolen property, his conviction on such plea could not support his sentence by circuit court to five years in penitentiary as dual

offender after five years of probationary period. Ard v. State, 91 So2d 166 (1957).

9. Deferment of imposition of sentence

Under this section power to suspend imposition of sentence can be exercised by trial judge only as an incident to probation. Helton v. State, 106 So.2d 79 (1958).

Where defendant was adjudged guilty, order purporting to defer sentence without placing defendant on probation under supervision of parole commission was denial of due process of law and sentence imposed upon defendant a year later became effective nunc pro tunc on date that defendant was adjudged guilty. Bateh v. State, App., 101 So.2d 869 (1958), certiorari discharged 110 So.2d 7, certiorari denied 80 S.Ct. 74, 361 U.S. 826, 4 L.Ed.2d 69.

Any action by trial court to suspending sentence indefinitely, with result that defendant would be placed on unsupervised probation, would constitute infringement upon powers lawfully delegated to executive branch of government. Id.

Where defendant was adjudged guilty, trial court had alternative, absent some sufficient and lawful reason for temporary delay, of passing sentence forthwith or suspending imposition of sentence and placing defendant on probation under supervision and control of parole commission. Id.

Trial court cannot, by the artifice of postponing the pronouncement of sentence, exercise the power to

conditionally parole or pardon a defendant who stands convicted of a crime. Id.

Where defendant pleaded guilty to charge of performing abortion and trial court adjudged defendant guilty and announced that sentence was deferred, there was such a "conviction" of defendant as to permit conviction of codefendant as accessory before the fact. Weathers v. State, 56 So.2d 536 (1952), certiorari denied 73 S.Ct. 276, 344 U.S. 896, 97 L.Ed. 692.

Where an adult if charged with violating §398.03 by selling narcotic drugs to a person who is under the age of 21, and where such adult pleads either guilty or nolo contendere, it is the mandatory duty of the court to judge him guilty and sentence him to serve a term of not less than ten years in the state prison instead of withholding the adjudication of guilt and placing such adult on probation. Op.Atty.Gen., 070-188, Dec. 30, 1970.

10. Duration of deferment

Where there was prompt pronouncement of year sentence but it was not put into effect for period of several years thereafter, there was in effect probation but an illegal one where defendant was not placed in custody of parole commission, and period during which sentence was not put into effect extended beyond two year period beyond the year sentence. Yates v. Buchanan, App., 170 So.2d 72 (1965).

Barring certain exceptions, sentence cannot be postponed indefinitely or for any considerable period. Id.

Where though one-year sentence was pronounced promptly, its enforcement was held off for a matter of years, it could not be put into effect thereafter, and sentence and commitment order were void. Id.

Trial judge has no power to hold in abeyance the passage of sentence on a convict and to impose sentence any time in the future, regardless of probation, but for procedural reasons such as determination of motions and other matters arising between time of verdict and judgment, or for purpose of gaining information necessary to imposition of a just sentence, or during pendency of other charges, or for good and valid reasons, there may be justifiable delay, and when a convict is put on probation, sentence may be deferred conditioned on obedience to terms of probation. State v. Bateh, 110 So.2d 7 (1959), certiorari denied 80 S.Ct. 74, 361 U.S. 826, 4 L.Ed.2d 69.

When trial judge delays sentence of convict power to sentence convict must be exercised before lapse of extreme period for which sentence could have been imposed, and, when it is inflicted, the term cannot be projected beyond the extreme period. Id.

Trial judge may withhold temporarily, or even from term to term, the imposition of sentence for purpose of determining motions and other matters arising between verdict and judgment, such as gaining information necessary to imposition of just sentence, or during pendency of other charges, or for other good and valid reasons, but cannot by the artifice of postponing pronouncement of sentence exercise the power to conditionally parole or pardon defendant. Helton v. State, 106 So.2d 79 (1958).

An order that passing of sentence on defendant's plea of guilty be continued from day to day and term to term until finally disposed of was not order for probation, nor order suspending imposition of sentence during defendant's good behavior, in absence of order placing defendant under Parole Commission's supervision for probation period or imposition of terms or conditions on defendant, so that he was not entitled to hearing on question of his good behavior since entry of such order before imposition of sentence. Pinkney v. State, 160 Fla. 884, 37 So.2d 157 (1948).

A trial judge, deferring imposition of sentence on defendant, may impose sentence at any time, either during term in which his guilt of offense charged is admitted or established or at later term, without first according him a hearing on question of his good behavior. Id.

11. Probation supervision pending appeal

Filing of notice of appeal from order withholding adjudication of guilt and placing defendant under supervision of probation and parole commission for five years did not divest trial court and commission of all jurisdiction over defendant pending appeal and did not entitle him to order directing the court and commission to cease supervising him pending the appeal. Varnom v. State, App., 198 So.2d 64 (1967).

12. Intermittent Incarceration

A judge cannot legally impose a sentence providing for intermittent incarceration, i.e. allow the prisoner to

leave each day to work at his regular job and return to the jail each night. Op.Atty.Gen., 061-22, Feb. 6, 1961.

13. Release after violation of probation

Where, upon being arrested and brought before the court on charge of having violated conditions of his probation, probationer is released with or without bail to await a further hearing, it is the duty of the probation and parole commission to continue to supervise the probationer under the conditions set forth in the original probation order while thus released and probationer is required to abide by the conditions of his probation while thus released. Op.Atty.Gen., 070-127, Sept. 18, 1970.

Where parolee has been arrested on charge of violating conditions of his parole, and has been admitted to bail pending hearing before the probation and parole commission, it is the duty of said commission to continue to supervise such parolee while he is thus released on bail and parolee is required to abide by the conditions of his parole while thus released. Id.

14. Revocation

Under its inherent power to revoke probation, circuit court properly revoked order of probation, the term of which had not yet commenced, where the Court determined that the probationer had been guilty of misconduct (while he was in county jail) occurring subsequent to the entry of the order of probation. Martin v. State, App., 243 So.2d 189 (1971).

Probation may be revoked solely upon conviction by jury of a subsequent crime, provided the subsequent conviction is valid. Egantoff v. State, App., 208 So.2d 843 (1968).

Filing, during probation period, of a separate information against defendant for some separate offense allegedly committed by him during term of probation cannot substitute for affirmative action required to be taken or initiated during term as prerequisite to revocation of probation. Brooker v. State, App., 207 So.2d 478 (1968).

15. Probationer's residence

A court placing on probation a defendant who is to reside in Florida has no authority to order the probationer not to report to or be under the supervision of Florida parole and probation commission. The statutes mandatorily require that when a defendant is placed on probation, he is to be under the supervision and control of said commission unless he is permitted to reside in another state under the compact set forth §949.07. The court may thereafter terminate that supervision pursuant to the terms of §948.05. Op.Atty.Gen., 072-223, July 13, 1972.

The only authority which a court has to allow a probationer to reside in another state is that granted by the compact set out in §949.07. That compact provides that before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of the probationer. The compact further unequivocally provides that the receiving state will assume the duties of visitation and

supervision over probationers of a sending state. Result is that when a court places a defendant on probation with permission to reside in another state, this must be done under the terms of said compact and the court has no authority whatever to order that the receiving state not investigate or supervise the probationer. Nevertheless, if the court later becomes satisfied that discharging the probationer from supervision in the other state will be for the best interests of justice and the welfare of society, then the court may discharge him from such supervision under the authority of §948.05. Id.

Where a defendant is placed on probation and is not permitted to reside in another state pursuant to the compact set forth in §949.07, the court placing him on probation has the authority to so frame the order of probation as to permit the probationer to travel to, but not to reside in, another state on a temporary basis. If the original order of probation does not so permit, court has the authority to later amend the terms and conditions thereof in such manner as to allow the probationer to do this. Id.

16. Alcoholic offenders

Indigent alcoholics who are repeat violators of §856.01 may be required to take antabuse as a condition of probation, if such medication is prescribed by a physician to arrest their ingestion of alcohol, if the necessary examination, treatment and medication can be provided by the department of health and rehabilitative services through an appropriate treatment resource under chapter 396, and if such condition of probation is

designed to protect society and to rehabilitate the probationer. Op.Atty.Gen., 072-124, April 5, 1972.

17. Review

Where sole order dispositive of defendant's rights is a probation order such order must be considered, at least for purposes of appeal, to be a final order. Delaney v. State, 190 So.2d 578 (1966), appeal dismissed 87 S.Ct. 1710, 387 U.S. 426, 18 L.Ed.2d 866.

Where trial judge entered order which withheld adjudication of guilt and placed accused on probation, two prior orders denying motions to quash indictment, each of which in effect upheld validity of criminal statute, traveled forward with order of probation to satisfy jurisdictional requirement of Supreme Court. Id.

District Court of Appeal had jurisdiction to review order placing defendant on probation following conviction by jury even though final adjudication of guilt had been withheld. Warren v. State, App., 174 So.2d 429 (1965).

[OCT 22 1979]

(F) 893.135(1)(a)(1)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

THE STATE OF FLORIDA

vs.

RONALD JOSEPH FARACE, WILLIAM DANIEL COWGILL, DANIEL ALAN ROBINSON, JOSEPH FRANCIS STUBBLEFIELD, TERRY V. SMITH, WILLIAM EUGENE COX, GARY CHARLES KNOWLES, RAY DANIEL DARVILL and VINCENT MICHAEL DOYLE

INFORMATION FOR

I. TRAFFICKING IN CANNABIS

II. CRIMINAL CONSPIRACY TO TRAFFIC IN CANNABIS

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

COUNT I

MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of

Broward, by and through his undersigned Assistant State Attorney, charges that

RONALD JOSEPH FARACE, WILLIAM DANIEL COWGILL, DANIEL ALAN ROBINSON, JOSEPH FRANCIS STUBBLEFIELD, TERRY V. SMITH, WILLIAM EUGENE COX, GARY CHARLES KNOWLES, RAY DANIEL DARVILL and VINCENT MICHAEL DOYLE between the 27th day of May, A.D. 1979 and the 9th day of July, A.D. 1979, inclusively, in the County and State aforesaid, did then and there unlawfully and knowingly have in their actual or constructive possession with intent to sell or deliver, a controlled substance, to-wit: Cannabis, in an amount of two thousand (2,000) pounds or more, but less than ten thousand (10,000) pounds, contrary to F.S. 893.135(1)(a)(2) and F.S. 893.03(1)(c) and F.S. 893.13(1)(a)(2),

COUNT II

And MICHAEL J. SATZ, State Attorney of the Seventeenth Judicial Circuit of Florida, as Prosecuting Attorney for the State of Florida in the County of Broward, by and through his undersigned Assistant State Attorney, further charges that RONALD JOSEPH FARACE, WILLIAM DANIEL COWGILL, DANIEL ALAN ROBINSON, JOSEPH FRANCIS STUBBLEFIELD, TERRY V. SMITH, WILLIAM EUGENE COX, GARY CHARLES KNOWLES, RAY DANIEL DARVILL and VINCENT MICHAEL DOYLE between the 27th day of May, A.D. 1979 and the 9th day of July, A.D. 1979, inclusively, in the County and State aforesaid, did then and there conspire, combine, agree, or confederate with one another to commit a criminal offense, to-wit: Trafficking in Cannabis, a controlled substance, in that

the said Ronald Joseph Farace, William Daniel Cowgill, Daniel Alan Robinson, Joseph Francis Stubblefield, Terry V. Smith, William Eugene Cox, Gary Charles Knowles, Ray Daniel Darville and Vincent Michael Doyle did conspire, combine agree or confederate to possess Cannabis with the intent to sell or deliver same in an amount of two thousand (2,000) pounds or more, but less than ten thousand (10,000) pounds, contrary to F.S. 777.04(3), F.S. 777.04(4)(b), F.S. 893.03(1)(c), F.S. 893.135 (1)(a)(2) and F.S. 893.13(1)(a)(2),

Judge Moe

[SEP 19 '79]

Case No. 79-7389CF-B

IN THE
CIRCUIT COURT
Seventeenth Judicial Circuit of Florida
In and for Broward County
STATE OF FLORIDA

THE STATE OF FLORIDA

vs.

RONALD JOSEPH FARACE, WILLIAM DANIEL COWGILL, DANIEL ALAN ROBINSON, JOSEPH FRANCIS STUBBLEFIELD, TERRY V. SMITH, WILLIAM EUGENE COX, GARY CHARLES COX, GARY CHARLES KNOWLES

Information for

RAY DANIEL DARVILL and
VINCENT MICHAEL DOYLE

I. TRAFFICKING IN CANNABIS

II. CRIMINAL CONSPIRACY TO TRAFFIC IN CANNABIS

Presented by State Attorney and Filed

ROBERT E. LOCKWOOD
Clerk of the Circuit Court

MICHAEL J. SATZ
State Attorney

COUNTY OF BROWARD
STATE OF FLORIDA

Personally appeared before me JAMES W. PHILLIPS, duly appointed as an Assistant State Attorney of the 17th Judicial Circuit of Florida by MICHAEL J. SATZ, State Attorney of said Circuit and Prosecuting Attorney for the State of Florida in the County of Broward, who being first duly sworn says that testimony has been received under oath from the material witness or witnesses and that the allegations as set forth in the foregoing Information are based upon facts that have been sworn to as true by the material witness or witnesses and which, if true would constitute the offense therein charged, and that he has instituted this prosecution in good faith.

/s/ [Illegible]
Assistant State Attorney, 17th Judicial Circuit of Florida

Sworn to and subscribed before me this 19 day of September, A.D. 1979.

ROBERT E. LOCKWOOD
Clerk of the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida

A TRUE COPY
Circuit Court Seal

By /s/ Linda B. Nagele
Deputy Clerk

To the within Information, Defendant pleaded ____

ROBERT E. LOCKWOOD
Clerk of the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida
By _____
Deputy Clerk

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NUMBER: 79-7389-CF

THE STATE OF FLORIDA,

Plaintiff,

vs.

WILLIAM DANIEL COWGILL, WILLIAM EUGENE COX, TERRY VON SMITH, VINCENT DOYLE, DANNY ROBINSON, JERRY STUBBLEFIELD and RONALD FARACE,

Defendants.

MOTION TO DISMISS

COME NOW the Defendants, WILLIAM DANIEL COWGILL, WILLIAM EUGENE COX, TERRY VON SMITH, VINCENT DOYLE, DANNY ROBINSON, JERRY STUBBLEFIELD and RONALD FARACE, individually and severally, by and through their undersigned attorney and respectfully move this Honorable Court to dismiss the Information filed herein on behalf of the State of Florida, upon the following grounds:

1. That the Information fails to state a crime consistent with the complaint against the Defendants.

2. That the Information fails to set forth the act consistent with the complaint according to the requirements of the State of Florida.

3. That the Information fails to state a crime under the laws of the State of Florida.

4. That the Information is so vague, indistinct and indefinite as to mislead the Defendants and embarrass them in their preparation of their defense.

5. That the Information could expose the Defendants after conviction or acquittal to subsequent danger of a new prosecution for the same offense.

6. That the Information is misleading and does not with sufficient clarity and certainty apprise the Defendants of the nature and cause of the accusation against them.

7. That the Information fails to allege with particularity the date on which the alleged possession of controlled substance occurred.

8. That the Information alleges a conspiracy to commit a violation of a Florida Statute, to wit: Trafficking in Cannabis, which is unconstitutional for the reason and upon the grounds set forth herein.

9. That the State of Florida has filed two separate and distinct Informations, both of which are pending before this Honorable Court, involving the same criminal episode contrary to the laws of the State of Florida.

10. That said Statute, under which the Defendant is charged is unconstitutional upon the grounds, but not limited thereto, as hereinafter stated:

a. That said Statute is so vague, indefinite, uncertain and insufficient as to be contrary to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Section 22 of the Declaration of Rights of the Constitution of the State of Florida.

b. That said Statute is without sufficient standard by which the guilt of the Defendants herein, may be determined.

c. That said Statute is ambiguous and allows for the creation of classifications and categories which are unreasonable, arbitrary and capricious.

11. Florida Statute 893.135 is so vague, uncertain and indefinite that the Defendants cannot properly prepare their defense thereto.

12. Florida Statute 893.135 violates the separation of powers doctrine provided for in the Constitution of the State of Florida in that it vests powers properly belonging to the Judiciary in the State Attorney, a member of the Executive Department. Subsection (3) of said Statute provides that the sentencing Court may not reduce or suspend the sentence of a person convicted of violating that section unless appropriate motion is first made by the State Attorney, thereby intruding upon the judicial prerogative.

13. Florida Statute 893.135, Subsection (3) is so vague, ambiguous and uncertain that it is unconstitutional in that it provides for the possibility of a reduction or suspension of sentence for any convicted person "who provides substantial assistance . . ." and, therefore, is not susceptible to reasonable or proper interpretation.

14. Florida Statute 893.135 is unconstitutional in that it provides for mandatory minimum terms of imprisonment which are arbitrary, capricious and unreasonable, effectively denying to the Defendants due process of law.

15. Florida Statute 893.135 is unconstitutional in that it unlawfully requires the Defendants to testify against their will and/or to give testimony against themselves in that Subsection (3) provides that the convicted person must provide "substantial assistance" before the Court may consider reducing or suspending his sentence on Motions of the State Attorney.

16. Florida Statute 893.135 violates the constitutional rights of the Defendants in that Subsection (3) expressly provides that if the Defendants are to receive relief from the imposition of a mandatory minimum term of imprisonment, the Court must consider the nature of "substantial assistance" provided by the Defendants, which "substantial assistance" would necessarily involve the Defendants' identifying others involved in the illegal transaction.

17. Florida Statute 893.135 violates the Defendants' right to equal protection under the law in that a person convicted of a claim under this Statute who cannot, through no fault of his own, provide the State with

"substantial assistance" is not entitled to reduction or suspension of his sentence.

18. Florida Statute 893.135 violates the constitutional rights of the Defendants in that Subsection (3) thereof places unbridled discretion in the hands of the State Attorney by permitting only the State Attorney, in his own discretion, to institute a procedure which would enable the sentencing Court to reduce or suspend the Defendants' sentence, and, further, by not permitting the Defendants' attorney, without Motion by the State, to bring evidence of "substantial assistance" before the Court, or even to permit the Court to act upon the same information which comes to its knowledge without an appropriate motion by the State Attorney, in which such "substantial assistance" would have been sufficient to justify a reduction or suspension of sentence had the matter been first raised by the State Attorney.

19. Florida Statute 893.135 is unreasonable, arbitrary and capricious in that the classifications created therein for the imposition of the mandatory minimum terms of imprisonment are themselves unreasonable, arbitrary and capricious, and not justified.

20. Florida Statute 893.135 is unconstitutional in that it imposes mandatory minimum terms of imprisonment and fines which are so extreme that they amount to the imposition of cruel and unusual punishment.

21. Florida Statute 893.03(3) is unconstitutional in that it is violative of procedural due process guarantees because it is unfair in permitting *only* the State to file a

motion bringing the matter of the Defendants' substantial assistance to the sentencing court's attention. There is absolutely no reason why the Defendants or the Judge, sus sponte, cannot consider the issue, giving the State the right to be fully heard on the issue.

22. Florida Statute 893.03(3) represents an unlawful delegation of power from the legislature to the executive department.

WHEREFORE, the Defendants, in consideration of the grounds hereinabove stated move this Honorable Court for an Order dismissing the Information filed in this cause.

LAW OFFICES OF
PHILIP CARLTON, JR.
Attorney for Defendants
19 West Flagler, Suite 220
Miami, Florida 33130
PH: (305) 377-1471
BY: /s/ Philip Carlton, Jr.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss was mailed to the Office of the State Attorney, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, Florida, 33301, this 29th day of October, 1979.

/s/ Philip Carlton, Jr.

[DEC 7 1979]

IN THE SUPREME COURT OF FLORIDA

TUESDAY, DECEMBER 4, 1979

STATE OF FLORIDA,

Appellant,

vs.

WILLIAM DANIEL COWGILL, WILLIAM EUGENE COX, TERRY VON SMITH, VINCENT DOYLE, DANNY ROBINSON, JERRY STUBBLEFIELD and RONALD FARACE,

Appellees.

CASE NO. 58,199

Proceedings in the above-styled cause are hereby stayed pending disposition of the case of State of Florida vs. Carlos M. Benitez, et al., Case No. 57,834 now pending in this Court.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: Nancy E. Ryals
Deputy Clerk

ner
CC: Hon. Robert E. Lockwood, Clerk
Patti Englander, Esquire
Philip Carlton, Esquire
Hon. Jim Smith

[JAN 11 1980]

SID J. WHITE, CLERK
SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE 32304

January 9, 1979
Case No. 58,199
State of Florida vs. Cowgill, et al

Philip Carlton, Jr., Esquire
19 West Flagler Suite 220
Miami, Florida 33130

Dear Sir:

I have this date received the below-listed pleadings or documents:

Appellees' motion for permission to file brief is hereby granted.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Clerk, Supreme Court

SJW/ner
CC: State Attorney's Office
Attorney General's Office

[SR 1]

BEFORE THE
FLORIDA SENATE
AT
THE CAPITOL
TALLAHASSEE, FLORIDA
APRIL 5, 1979

IN RE
SENATE BILL 83

[SR 12] crime of drug trafficking and now, under our present laws, there is really a void. We are at times arresting maybe the corporals, maybe the sergeants, even up to the lieutenants, to the majors, and the colonels, and never to the generals. The reason being is, for example, somebody comes in with or is caught, the man that's actually used because he can fly a plane or he can captain a ship, and he has 100 pounds of marijuana, and he comes in, he is caught, he may get sentenced to five years. He probably will be out in 18 months.

On one load alone, he could make from three hundred to half a million dollars of drugs; on 100 pounds or more, he can make that much money; so the risk of getting caught and being in jail for a short period of time makes it worthwhile economically.

Economically, all law enforcement tell us that the very heart of organized crime, the economic heart of organized crime is drug trafficking.

The Miami Herald alone estimated that over five billion dollars a year in illegal drugs trafficking in

Florida. We've got the unfortunate reputation as a drug haven. "60 Minutes" not too long ago talked about Florida in that way.

The reason for the Bill is to make the penalty stiff enough that that guy that flies that plane in, that pilots that boat in, and when he hears that door slam, and he knows that he is going to be there for sure from 3 to 25 years, it's going [SR 13] to make it worth his while to say who was financing the operation, where he got the money from; and I think it will contribute significantly to our drug problems—to solving our drug problem in Florida.

We can't, in Florida, no longer tolerate the reputation of being a drug haven. I think we should get this Bill passed; I hope it will be the first Bill enacted by the Florida Legislature and the word will go out through all the world that we're going to play hard ball in Florida with hard drugs. So I urge you to adopt the Amendment.

SENATE PRESIDENT:

Senator from the 35th is recognized.

SENATOR GORDON: Will the Senator yield for a question?

SENATOR SPICOLA:

I yield.

SENATOR GORDON:

Senator, you are a former State's Attorney, and you, I'm sure, have not lost your love for that particular office, so would, how would you know that anybody who was arrested would necessarily be charged under the Statute, since there are other statutes under which people can be charged?

SENATOR SPICOLA:

We do not know that they'd be charged under the Statute, but since law enforcement almost unanimously, in fact, I know of no one in law enforcement that does not support or

[SR 17] sentences at that time for alcohol or illegal drug smuggling, nor was there any incentive at that time, as provided in this Bill, that if the man was incarcerated cooperated that he would get some relief.

SENATOR GORDON:

Senator, the statement is, that those who do not read history are doomed to live it over again, and all those things were in the law, we had, all those, all those kind of business, it was the finest hour of the Coast Guard, that was the great expansion of the Coast Guard in this country, was to hold off the smuggling by boat, we just didn't have airplanes, so we have a somewhat different technological situation, but as a practical matter, we had the same situation and I think you really ought to examine, if you want to, if, if you really want to do away with the drug smuggling, and not just raise the price of the product, which is what you are going to do here, you are going to restrict the supply, raise the

price, and all you're doing in this Bill is raising the profit of the people in the drug business.

I wonder why you don't look at the alternative, as a good economist and say, why don't we simply lower the price, take the corruption out and solve the problem that way.

SENATE PRESIDENT:

Amendment on the desk. Read the Amendment.

CLERK:

[SR 40] Senator from the 36th, for what purpose do you rise?

SENATOR STEINBERG:

I would like to speak against the amendment.

SENATE PRESIDENT:

For what purpose does Senator Dunn rise?

SENATOR DUNN:

Against the amendment.

SENATE PRESIDENT:

Senator Spicola, recognized first—Senator from the 36th, then Senator from the 10th.

SENATOR SPICOLA:

Mr. President, Senators, briefly, this is just another amendment by the few on the floor here that have what I feel are not the strong prevalent view of our constituents as to our drug laws that will—actually in this amendment, actually goes to the heart of this bill, because, if this amendment is adopted, you, in effect, will go back to the existing law. And, if it's adopted, the whole concept behind this bill—the whole idea that when this guy that pilots the boat in or pilots the plane in, that when he is apprehended, and when he is sentenced to a minimum mandatory sentence, and when he hears the jail door slam shut, he will not know, if this amendment passes, he will not know that he will be in there for three years or ten years of fifteen years.

Then the whole incentive, the whole object of the bill, [SR 41] to make him cooperate, so we for once can move from just apprehending the mules and can move up to the thoroughbreds, to apprehend the generals instead of the privates, in this state, that will not be available and with this amendment there is no sense in passing this bill.

Now, under this law, and Senator Myers knows this, if this law is passed—under this law the prosecutors still have the option of other existing drug laws, and they can pick and choose, but they are given this option.

And, we did not hear from one State Attorney—and particularly we know of the support of your present State Attorney for this bill, and your present State Attorney was instrumental in all of this program that Governor Graham has now to beef up FDLE, to beef up

the State Attorneys, to try to do something about this drug problem.

You know, we've heard some talk about the fiscal impact. Isn't is strange, in Dade County, I'll give you one statistic, in Dade County in the last six months, there was fifty-nine murders—that's the county that is represented by Senator Gordon and Senator Myers. Fifty-nine murders, Senators. And the Federal Drug Enforcement Administration estimates, of those fifty-nine murders, over forty were drug related.

Now, I ask you, Senators, what is the fiscal impact of human life.

Now, you think about that when you vote on this

[SR 47] This bill says, Look, we'll put you in jail mandatorily for a period of time, but if you will help us in prosecution, we can amend that mandatory jail sentence. It's a way of using the law to help law enforcement. If you take away the mandatory provision on the law, you're basically putting us back to square one in our drug enforcement.

And I am—you know if—most of you know, when I've been a member of the House, I've supported the decriminalization of marijuana. That's not the issue here today, whether we're going to do anything with the felony or the misdemeanor question in the use of pot. That's not before us today.

We are dealing with sentences for the people who are transporting the large amount of drugs. We're not talking about the users. The user is not someone who's

going to have a hundred pounds of marijuana in his possession, or he is going to have five grams of heroin or twenty-eight grams of cocaine. That's not what we are talking about. The average user is not walking around in the cocaine area. You're talking a quarter million dollars or more of cocaine. Depending on the purity, you could be talking over a million dollars' worth. That's not the type of person we're getting at in this bill.

And I think if you go with Senator Myers' amendment, you're defeating the bill. You've got to vote down the amendment, then pass the bill as now amended, and let's get the message out.

Notes of Decisions

Construction and application 1
Service of subpoena 2

1. Construction and application

Constitution and statutes impose a duty upon state attorney to prosecute in circuit court any and all violations of criminal laws of which that court has jurisdiction either upon his own information or upon indictment by grand jury. State ex rel. Martin v. Michell, App., 188 So.2d 684 (1966), certiorari discharged 192 So.2d 281.

The test of whether or not the expense bill of a state attorney may be paid is whether or not it was incurred in the performance of duties imposed by statutes. State ex rel. Parker v. Lee, 113 Fla. 40, 151 So. 491 (1934).

This section simply imposes official duties and does not, probably, in any way detract from the powers which state attorneys have at common law. Miller v. State, 42 Fla. 266, 28 So. 208 (1900).

Where members of grand jury are sued for libel resulting from comments and criticisms appearing in their official report, if governor believes, in light of public interest and applicable law that public defense assistance is justified he may assign state attorney to defend members of grand jury as an arm of state on assumption that state is really the defendant or, in alternative, may recommend that applicable state and county funds be made available to provide defense counsel. Op.Atty. Gen. 056-251, Aug. 24, 1956.

2. Service of subpoena

Issuance and service of grand jury subpoena on petitioner did not violate any of petitioner's rights or any law or public policy by virtue of fact that subpoena was issued after grand jury had been drawn and summoned but before it was impaneled and sworn. State ex rel. Martin v. Michell, App., 188 So.2d 684 (1966), certiorari discharged 192 So.2d 281.

State attorney's authority to have grand jury subpoena issued after grand jury had been drawn and summoned but not impaneled and sworn was conferred upon him by implication by the constitution and statutory provisions imposing various duties upon the courts, grand jury, and state attorney. Id.

27.04 Summoning and examining witnesses for state

The state attorney shall have summoned all witnesses required on behalf of the state; and he is allowed the process of his court to summon witnesses from throughout the state to appear before him in or out of term time at such convenient places in the state attorney's judicial circuit and at such convenient times as may be designated in the summons, to testify before him as to any violation of the criminal law upon which they may be interrogated, and he is empowered to administer oaths to all witnesses summoned to testify by the process of his court or who may voluntarily appear before him to testify as to any violation or violations of the criminal law.

Historical Note

Derivation:

Laws 1957, c. 57-290, §1.
Laws 1945, c. 22634, §1.
Comp.Gen.Laws 1927, §4741.
Rev.Gen.St.1920, §3007.
Laws 1919, c. 7838, §10, sub. 2.
Gen.St.1906, §1781.
Rev.St.1892, §1346.
Laws 1877, c. 2094, §2.

Laws 1945, c. 22634, §1, added a sentence concerning the administration of oaths to witnesses who voluntarily appeared.

Laws 1957, c. 57-290, §1, modified the section by insertion of the words "from throughout the state"; by the substitution of the words "state attorney's judicial circuit" and "convenient times" respectively in lieu of "county where such witnesses reside" and "time"; and by merger of the former two sentences.

Cross References

Interview of witnesses, see Code of Professional Responsibility, Canon 7.
Issuance of subpoenas by state attorney, see §905.185.
Subpoena of witnesses, see Civil Procedure Rule 1.410.

Law Review Commentaries

Criminal law and procedure. Thomas A. Wills, 22 U.Miami L.Rev. 240, 241 (1967).

Discovery in criminal cases. Albert J. Datz, 16 U.Fla.L.R. 163 (1963).

Library References

District and Prosecuting Attorneys—8

C.J.S. District and Prosecuting Attorneys §§10, 14.

Notes of Decisions

In general 1
Contempt 7
Examination of witnesses 5
Expert witness fees 9
Oaths 4
Perjury 8
Right to counsel 6
Scope of powers 2
Time of issuance of subpoena 3

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1. In general

This section is remedial in nature and should be liberally construed. Barnes v. State, 58 So.2d 157 (1952); Collier v. Baker, 155 Fla. 425, 20 So.2d 652 (1945); State ex rel. Cooper v. Coleman, 138 Fla. 520, 189 So. 691 (1939).

State attorney is truly "one-man grand jury", and is investigatory and accusatory arm of our judicial system of government, subject only to limitations imposed by Constitution, common law and statutes for protection

of individual rights and to safeguard against possible abuses of far-reaching powers so confided. Imparato v. Spicola, App., 238 So.2d 503 (1970).

Subpoena duces tecum may not be utilized primarily for purpose of discovery, either to ascertain existence of documentary evidence or to supply facts needed for litigation, nor may it be employed for mere "fishing expedition", or general inquisitorial examination of books, papers or records with view to ascertaining whether something of value may not show up therefrom, or merely to gratify curiosity, or for information of public. Id.

Where subpoenas duces tecum were issued at specific direction of state attorney in connection with presumably lawful investigation which he was making in his official capacity, no showing was necessary that described records were material to existing or anticipated lawsuit or investigation. Id.

Witness summoned to be interrogated by state attorney could not refuse to answer on ground that it did not appear just what state attorney proposed to investigate, in view of authority of state attorney under this section. Gordon v. Gerstein, 189 So.2d 873 (1966).

Constitution and statutes impose a duty upon state attorney to prosecute in circuit court any and all violations of criminal laws of which that court has jurisdiction either upon his own information or upon indictment by grand jury. State ex rel. Martin v. Michell, App., 188 S.2d 684 (1966), certiorari discharged 192 So.2d 281.

The clerk of the Circuit Court is not authorized to issue either a subpoena or a subpoena duces tecum in a

criminal matter of any kind unless it names the witnesses to be subpoenaed at the time he issues it. Op.Atty.Gen., 067-56, Aug. 21, 1967.

The word "process", as used in this section, means "subpoena" or "subpoena duces tecum". Id.

2. Scope of powers

State attorney, in his official capacity as such, had plenary authority under common law and by implication of Constitution and statutes to activate subpoenas duces tecum, either independently or at behest of attorney general. Imparato v. Spicola, App., 238 So.2d 503 (1970).

Even as grand jury is immune from requirement of showing materiality in compelling production of testimony and documentary evidence it desires, so is state attorney in his official sphere. Id.

Vigor of state attorney in use of processes of court should be sustained and commended in all instances except where rights of others are impaired or denied. Id.

A state attorney has power to subpoena witnesses to appear before him and have them testify concerning matters which he is investigating. Smith v. State, 95 So.2d 525 (1957).

After grand jury had investigated a homicide and had returned an indictment charging first-degree murder, but before arraignment and setting case for trial, the state attorney could use process of court to require person who did not testify before grand jury and who had not been subpoenaed as defense witness, but who

knew something about facts of the crime, to come before state attorney before trial and submit to an interrogation under oath concerning such facts, even though such person asserted that she was a defense witness. Collier v. Baker, 155 Fla. 425, 20 So.2d 652 (1945).

We find nothing in the statute that attempts to limit the power of the state attorney to interrogate witnesses, except that the subject matter of the interrogation be confined to the question of the violation of any criminal law. Id.

State attorneys have power and authority to investigate or cause to be investigated all crimes within their circuits, whether triable by the circuit court or some other court, and may present the same to their grand juries. Op.Atty.Gen., 1943, p. 119.

3. Time of issuance of subpoena

That state attorney conducting investigation under this section chose to go forward without waiting until prospective witnesses arranged to be accompanied by their attorneys did not render the proceedings objectionable as secret. Gordon v. Gerstein, 189 So.2d 873 (1966).

Issuance and service of grand jury subpoena on petitioner did not violate any of petitioner's rights or any law or public policy by virtue of fact that subpoena was issued after grand jury had been drawn and summoned but before it was impaneled and sworn. State ex rel. Martin v. Michell, App., 188 So.2d 684 (1966), certiorari discharged 192 So.2d 281.

Subpoena which was issued after grand jury was drawn and summoned but before it was impaneled and sworn and which required that petitioner be brought to testify was not a command to testify under this section providing state attorney shall have summoned all witnesses required on behalf of state as to any violation of criminal law. Id.

State attorney's authority to have grand jury subpoena issued after grand jury had been drawn and summoned but not impaneled and sworn was conferred upon him by implication by constitutional and statutory provisions imposing various duties upon the courts, the grand jury, and the state attorney. Id.

4. Oaths

The assistant state attorney was authorized to administer an oath to witness summoned by state attorney to testify concerning a bond issue validation, and prosecution for perjury could properly be based upon alleged false swearing under oath so administered. State ex rel. Cooper v. Coleman, 138 Fla. 520, 189 So. 691 (1939).

This section empowering state's attorney to swear witnesses summoned to testify by court process means that state's attorney may swear such witnesses only for purposes set forth in process. State ex rel. Stewart v. Coleman, 122 Fla. 368, 165 So. 272 (1936).

Where witness is summoned by process of court to testify in designated criminal case, this section empowering state's attorney to swear witnesses does not authorize state's attorney to swear such witness in some other criminal case. Id.

Where witness is summoned by process of court to testify in civil action, state's attorney may not swear such witness in criminal case. Id.

Witness summoned before grand jury could not be charged with perjury for allegedly false statement made under oath to state's attorney in independent investigation made by him apart from grand jury. Id.

5. Examination of witnesses

Under this section and former rule B, §1, Canon 39, Code of Ethics Governing Attorneys, relating to an attorney's interviewing witnesses for the opposing side, state attorney has right to call before him and examine, under oath, any person whom he has reason to believe may have any information concerning a criminal cause under investigation, either before or after indictment or information filed, or before or after such person may have been served with a subpoena as a witness for any defendant, so long as such examination is carried on in a lawful manner. Barnes v. State, 58 So.2d 157 (1952).

This section authorized interrogation of witnesses concerning whether there had been any violation of criminal law, and did not limit power of interrogation to issues involving crime, or require that examination be before court. State ex rel. Cooper v. Coleman, 138 Fla. 520, 189 So. 691 (1939).

Overruling blanket objection to cross-examination of defense witness as to statements made by witness, for whose absence accused had requested continuance, when witness, on returning to jurisdiction before motion for continuance was ruled on, was summoned before assistant state attorney for examination, was not error,

although examination related to contents of motion for continuance and cross-examination was subject to seasonable objection if it in any way tended to unduly discredit witness. Carlile v. State, 129 Fla. 860, 176 So. 862 (1937).

State attorney has very broad discretion in examining witnesses prior to indictment, but, after indictment has been found, his discretion is limited as to accused's witnesses. Id.

State attorney was authorized to cause process to be issued and have witnesses brought before him to inquire into the commission of crime throughout his circuit, including the county in which there was a criminal court of record regardless of whether the crime so investigated was within the trial jurisdiction of the circuit court. Op.Atty.Gen., 1938, p. 118.

6. Right to counsel

Witness summoned to testify before state attorney regarding violations of criminal laws was not entitled to have counsel present. Gordon v. Gerstein, 189 So.2d 873 (1966).

Attorney for witness may be present in open hearing during investigation conducted by state attorney so long as he does not interfere with course of the investigation. Id.

7. Contempt

If attorney of witness present at open hearing during investigation conducted by state attorney

interferes with course of the investigation he may be regulated by proceedings in contempt. Gordon v. Gerstein, 189 So.2d 873 (1966).

Witness who had been summoned to testify before state attorney regarding violations of criminal laws and who refused to answer questions unless accompanied by his attorney was guilty of contempt. Id.

8. Perjury

In order to sustain conviction for perjury, offense must be proved by oaths of two witnesses, or by oath of one witness and other independent corroborating circumstances which are deemed of equal weight with testimony of another witness. Duval v. State, App., 104 So.2d 789 (1958).

9. Expert witness fees

Expert witnesses subpoenaed by the state to testify before the grand jury and state attorneys concerning criminal law violations and other matters may not be paid additional fees in excess of the witness fees allowed by general statutes. Op.Atty.Gen., 058-313, Nov. 26, 1958.

The state, in criminal cases, would probably be bound by a court order for the payment of expert witness fees in excess of such fees allowed by general law, unless set aside or reversed by a direct attack. Id.

27.05 Assisting attorney general

In addition to the duties now imposed upon the several state attorneys of this state, by statute, they

shall assist the attorney general in the preparation and presentation of all appeals to the supreme court, from the circuit court of their respective circuits, of all cases, civil or criminal, in which the state is a party.

Historical Note

Derivation:

Comp.Gen.Laws 1927, §4742.
Rev.Gen.St.1920, §3008.
Laws 1905, c. 5399, §1.

Library References

Attorney General —2.
District and Prosecuting Attorneys —7.
C.J.S. Attorney General §3.
C.J.S. District and Prosecuting Attorneys §12.

Notes of Decisions

1. In general

The test of whether or not the expense bill of a state attorney may be paid is whether or not it was incurred in the performance of duties imposed by statutes. State ex rel. Parker v. Lee, 113 Fla. 40, 151 So. 491 (1934).

A legislator or a city councilman and, perhaps, a city or county attorney, may, be employed as a part-time assistant state attorney. Op.Atty.Gen., 071-296, Sept. 24, 1971.

[13]

BEFORE THE
HOUSE OF REPRESENTATIVES
COMMITTEE ON CRIMINAL JUSTICE
AT
THE CAPITOL
TALLAHASSEE, FLORIDA
APRIL 3, 1979

IN RE
PROPOSED COMMITTEE BILL 16

[16] the jury was back in five minutes, turning them loose. Conspiracy is hard to prove.

So therefore, I think the Governor has come up with a (inaudible) that I can support. Two reasons: number one, you're dealing with a crime that involves a conspiracy and it is necessary to have testimony where one party to the conspiracy turns state's evidence, so that you can ultimately convict the person that financed the operation. In addition to that, I think this is not a pure mandatory minimum. It is a mandatory minimum if you are caught and convicted or enter a plea and choose not to aid and assist law enforcement. And I think it's going to work because right now, if a pilot or a courier is arrested, what he'll do, he'll spend two to three years in Raiford, at two or three hundred thousand dollars a year, because it's profitable for him to stay in jail. If you told him it's going to be fifteen years in Raiford without gain time, without a possibility of parole or probation, he's not going to spend fifteen years in Raiford, he's going to turn state's evidence. So, I think because of the fact that there is a way out, it is not a pure mandatory minimum on one hand and

number two, because it involves a crime that of necessity must be a conspiracy, I both heartily endorse and support the concept.

Thank you, Mr. Chairman.

MR. CHAIRMAN: Thank you, Mr. Chairman.

REPRESENTATIVE MARTINEZ: Mr. Chairman.

[47] has been pronounced. And the man goes off to jail. This is what the big man really wants, because he's been taken out of the system, and he can't hurt him anymore. We have a void, now. There's no way to reach him. All we're dealing with these people now is with the Parole and Probation Commission; are they good people in jail? And lots of times, of course, they're wonderful people in jail. All kinds have been sentenced to get out.

So, they're model prisoners, and we have just, with a minimum mandatory that Mr. Haben is talking about, we have just done exactly what the higher-ups would like to do; we have put these people off in jail, away from where they can hurt the people that are higher up.

Now, this bill comes in, and fills this void. It says that, and gives us a new tool, and it says if you're in jail, and when the steel bars close is when these people really start thinking, you're in jail now, there is a tool that didn't exist before. When the reality of this thing sets in on you for the three years to five years to ten years, and you want to cooperate, we now have a vehicle by which you can cooperate.

Many of these people are not believers until the sentence is actually pronounced, and then we would have the opportunity to take full advantage of the information these people could give us, and our system's one, two, three steps, all the way along the line, would have the strength that we

[49] REPRESENTATIVE EASLEY: Yes, what does go in there?

MR. CHAIRMAN: "Reduce or suspend the sentence."

Without objection—any objection? Show the amendment passing without objection. Representative Smith.

REPRESENTATIVE SMITH: I'd like to bring this to the bottom line. I really would.

I'm a criminal defense attorney, and I've practiced a number of years doing that kind of work in addition to some others. I've also been involved in the PTA's, being a past president, involved in the juvenile justice system a couple of years, and I'll tell you the truth, it hurts me desperately every time I hear that people say we haven't got the funds, we haven't got the manpower, we haven't got the money to stem this ever-increasing tide. And I turn around and I see children by the hundreds hooked on drugs from cannabis all the way up.

I am not yet convinced in my own mind that cannabis either does or does not start them on the road to the more habitual and addictive drugs, but, in any event, I

believe it's a link in the chain to some degree. We have a problem in my county and many other counties in this state, where children who run away, for a number of reasons, from home, wind up in the drug train because of their minimal contact with social and economic circumstances prevents them from making the kind of decision that they ought to make. They either get recruited [50] to be in it, or because of peer pressure, start in it.

We must take some stand. If we haven't got the dollars to be able to totally, as an army of law enforcement, get into the fight and beat them at their own game, we ought to take some other steps which don't cost us the money. This is a totally no-fiscal-impact type of bill, it seems to me, and I, frankly, have two children who are growing up. I'd hate like hell to have to some day look at my kid and stand him before a judge in my county, because he started smoking, and have to look at him and think that I had something that I could have done, and didn't do it, for whatever reasons I would have had.

It doesn't cost us anything. It's about time we standing toe to toe with these people and slugging it out. We have been made the laughing stock of the United States. We are the importers, in an indirect sense, because we don't have the ability to police our own borders, on the sea, especially, and whatever tools are available to us should be maintained.

Now, as an attorney, this bill wouldn't bother me at all, because, quite honestly, you make the punishment greater, you make the fines greater, you're going to increase the lawyers' fees. There's nobody here that

should be concerned about that, and I'm certainly not. Now, that's not meant at anybody—I mean, as an attorney, I don't—you know, we convict them—if they're defended on one charge, they're defended

[60] person can petition the Court to lower the sentence but only after he has cooperated and has given him substantial information to help prosecute others, for the crime.

"More questions, please? Another question . . .

"On the fact that he would not get off scot-free? right, he would serve some time?

"It would depend on the circumstances, but the real thrust of this thing is to try and make sure that that person, that the State Attorney, the prosecution has enough of a hammer over that person's head to make them talk; the problem has been we are able to get the . . the . . . the people . . . the lower echelon figures, but what we really need to get is the higher echelon figures and this is what this is aimed at.

"Thank you. For what purpose does Dr. Gerardo arise?

"To ask a question.

"Of Mr. Crawford.

"Will the gentleman yield?

"Yes.

"Gentleman yields.

"[Dr. Gerardo]—Mr. Crawford I would like to commend everyone involved in this Legislation because this strikes at the heart of one of the thing that causes us more problems with our youth in this country and specially in our State; however, I wanted to ask you a question similar to what Mr. Reddy (phonetics), because I want to make sure it does exactly what you want it to do, and that is, we want to be able to touch the figures that really control this; not necessarily as Rep. Haven said yesterday the mules and the transporters, we are talking about the higher figures; now, the question is this . . . after a person has been found guilty and has gone probably to prison and has spent there maybe a year or so, I can see where this in itself that person's experience incarcerated will probably have some positive effect of after a few days, months or years in prison, it might change their mind, where a person will, say, you know, I can take it; does the Bill allow that after any time, and during that person's incarceration they can come back and put the finger on those persons who are responsible and if they . . . if their information is substantial enough that that will in fact occur anywhere during the process of the carrying out of the sentence. . . .

"That is correct, Rep. Gerardo; any time after the conviction, either at time of sentencing or after the person is in prison they will be serving a minimum mandatory sentence and any time that they wish to cooperate the sentence can be reduced.

"Thank you.

"Rep. Martinez, do you have your Amendment?

"I have the Amendment on the desk.

[61] "There are several people, I think, that are standing wishing to state the issue, and maybe I think the best way to do it is to take Mr. Martinez' Amendment and to debate that and move on. Read the Martinez' Amendment.

"Re. Martinez offered the following Amendment:

"On page 3, line 28, after the period, insert "the Court shall conduct a hearing with respect to the reduction or suspension of the sentence and the Defendant shall be entitled to be present at such hearing.

"Reading in the Amendment, Mr. Chairman.

"Mr. Martinez is recognized at this point.

"[Mr. Martinez]—Ladies and gentlemen of the House, this Amendment cures what I think might be a defect in what is a good Bill; the Amendment, I think, merely gives it a little safeguard; what happens under this Bill the way it's written is that if you are caught with a certain amount of contraband items, or tons of marijuana, then what happens is the State Attorney wants to get some information, so he tells the Defendant, 'listen, if you cooperate with me and you tell me certain things, so that I can apprehend the next echelon over, I might help you out, and I can help you out because I can file a Petition with the Judge and I can tell the Judge, Judge he has helped me and I've got a lot of information and I'm about ready to bust a multi-million dollar finacier

of drugs' now, that Defendant is sitting in jail because the Bill says that you can strike the deal but the time that after he's already convicted; now this guy is . . . already helping, it's, it's like a witness protection program, okay? that the federal government uses, but we don't finance any protection for this guy, we just tell him you are not going to jail if you help us . . . but he can't go to the Judge later and say, 'Judge the State Attorney welched . . . he can't go and the policeman can be there, the guy that arrested him the arresting agency can go to this hearing and give evidence in aggravation or mitigation . . . but the Defendant under the way the Bill is worded doesn't even have to be present . . . if the State Attorney and the police decide not to let that deal go through because they are not happy with all the information they gave them, or they messed it up or didn't ask the right questions, the Defendant is left at the mercy of everyone including . . . remember now he's got three years in jail minimum and these guys who is talking on also are going to be in jail and that Defendant is not going to cooperate; if he does cooperate you will have this good piece of Legislation in litigation for years to come, for example, gentlemen, we thought that the death penalty had gone; it arrived again . . .

"Excuse me, Mr. Martinez, will the House come to order? Members please take your seats? I'm sorry, Mr. Martinez, would you please continue?

"So, last night they commuted the sentence of this man Evans; I don't know why, but they did . . . if we are talking about the big money people and it's true they will give you $50,000 a year to sit in jail for three years, and that actually happens; the big guy takes

care of the family, the man comes out he has $150,000 and he is going to wear his gold chain and he is going to Europe. That is going to continue to happen unless you give the Defendant the man who made the deal, some opportunity . . . I thought of amending so that he will also be allowed to petition the Court under this thing, and, and, the proponents of the Bill that no, let's not even give him that chance;

[63] "For what purpose does Mr. Crawford arise?

"To speak against the Amendment.

"Mr. Crawford is recognized.

"Mr. Speaker, Members of the House; I think what Rep. Haven said is very clear; but keep in mind the only reason for the Petition is to reduce the sentence, we are not talking about an increased sentence that can only benefit the convicted person; so I don't think we need the Amendment we discussed this in Criminal Justice, ah, it is probably, it's not necessary that we put it on at this time and it's very important that we get this Bill out today if we are going to have your help doing that . . . .

"For what purpose Ms. Sampler (phon.) arise.

"To speak on behalf of the Amendment, Mr. Speaker.

"Lady is recognized.

[Ms. Sampler]—It would seem to me that you denying anyone who happens to have his life or his term in jail in jeopardy a trial in Court; so what, it's a mini-trial? he

is entitled to this; I think Mr. Martinez' Amendment is exactly right, and I think that this kind of justice is not accorded the Defendant in writing in this Bill it will throw in jeopardy the very fine Bill that otherwise is. I suggest that you vote for Mr. Martinez' Amendment.

"I think we've probably have had enough debate on the Amendment.

"Mr. Martinez, would you like to close?

"Yes, sir.

"[Mr. Martinez]—Ladies and gentlemen of the House I think you are making a mistake and Mr. Haven did a beautiful job, you know, that's one of the things that Mr. Haven is very good about; you ask him a question and he answers the one he wants to answer; not the question that you asked him; he didn't speak of my Amendment; he spoke of all the good of the Bill; and, and, I could do that; I know what the Bill does; and I know what a conspiracy is and I'm telling you that you are not going to do anything with this Bill because if I represented a guy who is about ready to rat on a huge organization you are talking about millions of dollars, and you are telling this guy, if you are a good boy and tell us everything we want to know, not everything you know, see, that's what the Bill says, you tell me everything we want to know, not what the man who is going to tell them knows; he may not know everything they want to know; but he still talked; so what it is is a legal rubber hose; you are hitting the guy with a rubber hose; except in this case it's not a rubber hose, it's a rubber carrot you are holding out in front of him and when he says, when you tell us or the State Attorney

says, 'when you tell me everything I want to know about this organization then I might talk to the Judge, the man is not going to do it; otherwise, the Bill is fine.

"Thank you.

"We'll now proceed to vote on the Martinez' Amendment. If you favor the Amendment as offered by Mr. Martinez signify by saying "aye" [chorus of "ayes"]; opposed "no" [chorus of "no's"]—the Amendment fails. Are there further Amendments?